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No. 80-1681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES,
ILLINOIS, et al.

Appellants,

v.

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
an Illinois Corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

RICHARD N. WILLIAMS
Village of Hoffman Estates
1200 North Gannon Drive
Hoffman Estates, IL 60196
(312) 882-9100

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APPEAL DOCKETED APRIL 3, 1981
PROBABLE JURISDICTION NOTED JUNE 1, 1981

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IN THE UNITED STATES DISTRICT COURT

For The Northern District of Illinois

Eastern Division

THE FLIPSIDE, HOFFMAN ESTATES, INC., AN ILLINOIS CORPORATION,
Plaintiff

vs. No.

VILLAGE OF HOFFMAN ESTATES, Illinois, a Municipal Corporation; VIRGINIA M. HAYTER, individually and in her official capacity as President of the Village of Hoffman Estates, Illinois; RICHARD WILLIAMS, individually and in his official capacity as Attorney for the Village of Hoffman Estates, Illinois; JOHN O'CONNELL, individually and in his official capacity as Chief of Police for the Village of Hoffman Estates, Illinois; and the following, individually, and in their official capacity as Trustees for the Village of Hoffman Estates, Illinois; WILLIAM W. COWIN, WILLIAM A. PALMER, BRUCE C. LIND, RALPH H. LYERLA, THOMAS W. TAYLOR and LEE DODGION,
Defendants

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF, AND FOR DAMAGES PURSUANT TO 42 U.S.C. 1983
(Filed May 30, 1978)

Comes Now the Plaintiff, THE FLIPSIDE, HOFFMAN ESTATES, INC., by and through its attorneys, Michael L. Pritzker, Marvin

Leavitt, R. Brent Daniel and Pritzker and Glass, Ltd., and complaining of the Defendants, Village of Hoffman Estates, Virginia M. Hayter, William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor, Lee Dodgion, Richard Williams, John O'Connell and each of them, represents and alleges:

THE PARTIES

1. The Plaintiff, The Flipside, Hoffman Estates, Inc., is a corporation duly licensed by the State of Illinois, doing business within the Northern District of Illinois, one store being located at 2348 West Higgins Road, in the Village of Hoffman Estates, State of Illinois.

2. The Village of Hoffman Estates is a Municipal Corporation located in the County of Cook, State of Illinois.

3. The Defendant, Virginia M. Hayter was the President of the Village of Hoffman Estates, State of Illinois, at all times herein alleged.

4. The Defendant, Richard Williams, was the attorney for the Village of Hoffman Estates, State of Illinois, at all times herein alleged.

5. The Defendants, William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor, and Lee Dodgion, were trustees of the Village of Hoffman Estates, State of Illinois, at all times herein alleged.

6. The Defendant, John O'Connell, was the Chief of police of the Village of Hoffman Estates, State of Illinois at all times herein alleged.

JURISDICTION

1. This action arises under the Constitution of the United States, Specifically; the First Amendment; the Fourth Amendment; the Fifth Amendment; the Eighth Amendment; the Fourteenth Amendment; Article I, Section 8, Clause 3; the Commerce Clause of the Constitution of the United States; and Article I, Section 10, of the Constitution of the United States.

2. The Plaintiff, The Flipside, Hoffman Estates, Inc., seeks a declaratory judgment that the Village of Hoffman Estates, Ordinance No. 969-2978, Section 8-7-16 is unconstitutional; and further seeks a Temporary Restraining Order, a Preliminary Injunction, and a Permanent Injunction prohibiting application and enforcement of said Ordinance by the above-named Defendants, and all other agents, officers, servants, employees, and attorneys of the Village of Hoffman Estates, State of Illinois.

3. The Plaintiff, The Flipside, Hoffman Estates, Inc., further seeks relief pursuant to 42 U.S.C. 1983, for Defendants' actions under color of law which caused the Plaintiff to be deprived of rights, secured to it by the Constitution of the United States.

4. The Plaintiff, The Flipside, Hoffman Estates, Inc., alleges that due to the wrongful acts of the Defendants, and each of them, it will suffer extreme hardship, irreparable injury, and that there exists no complete and adequate remedy at law.

5. That the Plaintiff, The Flipside, Hoffman Estates, Inc., alleges that the amount in controversy exceeds ten thousand dollars ($10,000.00) exclusive of interests and costs.

Accordingly, this is an action in equity with jurisdiction conferred upon this Honorable Court pursuant to 28 U.S.C. § 1331; 28 U.S.C. § 2201 and 2202 and 28 U.S.C. § 1343.

VENUE

1. The Plaintiff, The Flipside, Hoffman Estates, Inc., alleges venue pursuant to 28 U.S.C. § 1391(b) in that all parties-Defendant to this action reside within the Northern District of Illinois and further that all the acts complained of did occur and presently continue to occur within the Northern District of Illinois.

BASIS FOR THIS ACTION

1. That the Defendants herein are residents and officers of the Village of Hoffman Estates, State of Illinois, who, acting individually, and in their official capacities, did on February 20, 1978, enact a certain criminal Ordinance No. 969-1978, Section 8-7-16 (a copy of which is attached hereto and made part of as Appendix A) and did further threaten Plaintiff with the application and enforcement of said Ordinance, which provides for criminal penalties should a violation occur.

2. That the Plaintiff has at all times complied with all laws governing the conduct of its business but will be unable to comply with Ordinance No. 969-1978, Section 8-7-16 for the following reasons:

a) That said Ordinance by its own terms concedes that the items covered are "legal retail items" (second paragraph of the preamble to the Ordinance.)

b) That because said Ordinance is overly broad and vague in its terms, men of common intelligence are incapable of determining precisely what items fall within the ambit of said Ordinance.

c) That although the Plaintiff engages only in the lawful sale of general items to be used only in a lawful manner, compliance with said Ordinance would require Plaintiff to file false affidavits indicating that certain of

these items are being sold with the intention that they be used for an unlawful purpose. (See Appendix B)

3. That Ordinance No. 969-1978, Section 8-7-16 unconstitutionally restrains the exercise of Plaintiff's First Amendment Rights by restricting and regulating the manner in which literature may be sold or displayed. (See License Guidelines attached hereto and made part of as Appendix C)

4. That subsection (D) of Section (1) of said Ordinance, requiring that Plaintiff keep records of the names and addresses of purchasers of items that may fall within the ambit of said Ordinance infringes upon Plaintiff's Fourth Amendment rights.

5. The Plaintiff alleges that Ordinance No. 969-1978, Section 8-7-16 fails to provide adequate notice to those who would be law abiding and forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

6. That Plaintiff believes said Ordinance fits squarely within the "void for vagueness" doctrine, and is therefore violative of the Fifth and Fourteenth Amendments to the Constitution of the United States.

7. Plaintiff alleges Ordinance 969-1978, Section 8-7-16 violates the due process clause of the Fifth and Fourteenth Amendment in that the means sought to be employed present an unreasonable, burdensome, and unworkable method to prevent the use of cannabis and controlled substances, and is not related to the legitimate purpose of a criminal statute.

8. That Ordinance No. 969-1978, Section 8-7-16 is inquisitorial in nature, authorizing improper and burdensome interference with the orderly conduct of a lawful business enterprise, and in that there exists no reasonable ground for suspecting a violation of law or a threat to public welfare, it abridges the Fifth and Fourteenth Amendments to the Constitution of the United States.

9. Plaintiff alleges that Ordinance No. 969-1978, was enacted specifically to punish and interfere with the conduct of Plaintiff's business in violation of Article I, Section 10, Clause 1 of the Constitution of the United States.

10. Plaintiff alleges that Ordinance No. 969-1978, Section 8-7-26 violates the Eighth Amendment prohibition of excessive fines and cruel and unusual punishment in that Plaintiff may be punished for conduct that citizens of common understanding and intelligence would not interpret to be unlawful, but may be held unlawful due to the vague language contained in said Ordinance.

11. Plaintiff alleges that enforcement of Ordinance No. 969-1978, Section 8-7-16 constitutes an unreasonable and impermissible interference with interstate commerce in violation of Article I, Section 8, Clause 3; the Commerce Clause of the Constitution of the United States; by improperly infringing on Plaintiff's right to conduct business in interstate commerce.

12. That Plaintiff alleges that this purported regulatory scheme unreasonably impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States.

13. The Plaintiff, The Flipside, Hoffman Estates, Inc., alleges that it has suffered and will continue to suffer extreme hardship and irreparable injury in the form, inter alia, of loss of business, clientele, good will, and profits, all in an amount uncertain but in excess of TEN THOUSAND DOLLARS ($10,000.00), and in being subjected to criminal prosecution upon enforcement of Ordinance No. 969-1978, Section 8-7-16.

14. That Plaintiff has no plain, adequate or complete remedy at law, and the instant suit for Declaratory Judgment and Injunction Relief is the only adequate remedy.

15. That Plaintiff, The Flipside, Hoffman Estates, Inc., has already suffered substantial loss of profit and will suffer other

and more extensive damages upon enforcement of said Ordinance.

16. That Plaintiff, The Flipside, Hoffman Estates, Inc., will be unable to retain certain employees of said business should said Ordinance continue to remain in effect.

17. That should Plaintiff be forced to challenge each and every particular application of said Ordinance, as determined by law enforcement officers, the Plaintiff shall be forced to engage in multiple actions and lawsuits in order to protect its rights.

WHEREFORE, Plaintiff prays that:

1. This Honorable Court forthwith issue a Temporary Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining the Defendants from enforcing Village of Hoffman Estates Ordinance No. 969-1978, Section 8-7-16.

2. That this Honorable Court issue a Preliminary and Permanent Injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the Defendants from enforcing Village of Hoffman Estates Ordinance No. 969-1978, Section 8-7-26.

3. That this Honorable Court declare pursuant to 28 U.S.C. § 2201 and 2202 that Village of Hoffman Estates Ordinance No. 969-1978, Section 8-7-16 is violative of the First Amendment, the Fourth Amendment, the Fifth Amendment, the Fourteenth Amendment, the Eighth Amendment, Articles I, Section 8 and Section 10 of the Constitution of the United States and therefore void and unenforceable.

4. That this Honorable Court grant such other relief as may be due and proper.

Respectfully submitted,
/s/ Marvin Leavitt
Marvin Leavitt
PRITZKER & GLASS, LTD.
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-6666

I, CARL ROSENBAUM, being duly sworn on oath depose and say that I am agent for the Plaintiff, THE FLIPSIDE, Hoffman Estates, Inc.; that I have read and understand the foregoing Complaint for Declaratory Judgment and Injunctive Relief, and that the facts set forth therein are true and correct.

/s/ Carl Rosenbaum
Carl Rosenbaum

Subscribed and Sworn to before me
this 30th day of May, 1978.

/s/ Susan Decker
Notary Public

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional Section, 8-7-16, which additional section shall read as follows:

Sec. 8-7-16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or

drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs	$150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

Section 4: That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5: That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

PASSED this 20th day of February, 1978

APPROVED this 20th day of February, 1978.

VOTE: AYES 3 NAYS 3 ABSENT 0

President Hayter voted aye.

APPROVED:

/s/ Virginia M. Hayter
Village President

ATTEST:

/s/ Regina F. Gold
Deputy Village Clerk

Appendix B

AFFIDAVIT

I hereby swear or affirm that in compliance with requirements of Section 8-7-16 of the Hoffman Estates Municipal Code and with knowledge of penalty up to $500.00 that I am authorized by , Hoffman Estates to sell items that may be covered by said Section 8-7-16 and that I have never been convicted in any court of law of a drug-related offense.

_____

Subscribed and sworn to me this
day of , 19 .

_____

Notary Public

Appendix C

LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

UNITED STATES DISTRICT COURT

Eastern Division

Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

ANSWER TO PLAINTIFF'S COMPLAINT ON BEHALF OF DEFENDANTS

Now comes the defendants, VILLAGE OF HOFFMAN ESTATES, VIRGINIA M. HAYTER, JOHN O'CONNELL, WILLIAM W. COWIN, WILLIAM A. PALMER, BRUCE C. LIND, RALPH H. LYERLA, RICHARD N. WILLIAMS, THOMAS W. TAYLOR and LEE DODGION, by their attorney, Richard N. Williams, and answers Plaintiff's Complaint as follows:

THE PARTIES

1.-4. The defendants admit the allegations of paragraphs 1, 2, 3 and 4.

5. The defendants deny the allegations of paragraph 5 as to Lee Dodgion.

6. The defendants admit the allegations of paragraph 6.

JURISDICTION

1.-5. The defendants deny the allegations of paragraphs 1, 2, 3, 4 and 5.

VENUE

1. The defendants admit the allegations of paragraph 1.

BASIS FOR THIS ACTION

1.-17. The defendants deny the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17. Wherefore, defendants deny that plaintiffs are entitled to any relief of judgment and prays the suit be dismissed with costs.

/s/ RICHARD N. WILLIAMS
Richard N. Williams

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton
Cause No. 78 C 2114 Date December 12, 1978

Title of Cause

The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, et al.

ORDER

Reserve space below for notations by minute clerk

Plaintiff's motion for the court to assume jurisdiction is granted. Plaintiff's motion for the court's determination that the challenged ordinance is unconstitutional and for the granting of a preliminary injunction pursuant to Rule 65, Fed.R.Civ.P., is denied. The cause is set for status hearing on January 5, 1979, at 1:00 p.m.

Docketed December 13, 1978

/s/ Leighton, J.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed March 23, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that the full and complete testimony and evidence received in preliminary proceedings by this Honorable Court on September 1, 1978 shall be made a part of the trial record in this case as though the same questions were asked, the same answers given and the same evidence introduced.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that the attached Ordinance 932-1977 duly enacted October 3, 1977 shall be made a part of the trial records, such Ordinance having been referred to at Page 82 and Page 83 of witness Richard N. Williams direct testimony.

ORDINANCE NO. 932-1977

AN ORDINANCE ADDING A NEW ARTICLE TO THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES KNOWN AS THE "HOFFMAN ESTATES ADMINISTRATIVE PROCEDURE ORDINANCE"

NOW, THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, a Municipal Corporation of the County of Cook, State of Illinois, as follows:

Section 1: That a new Article be added to the Municipal Code of the Village of Hoffman Estates to be known as "The Hoffman Estates Administrative Procedure Ordinance" as follows:

CHAPTER 5

Article 8—Administrative Procedures Ordinance

Sec. 5-8-1—Applicability: This Ordinance applies to every Department as defined in Chapter 5.

Sec. 5-8-2—Rule: "Rule" means each Departmental statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any Department, but does not include (a) statements concerning only the internal management of a Department and not affecting private rights or procedures available to the public, (b) informal advisory decision or (c) intra-departmental memoranda.

Sec. 5-8-3—Adoption of rules; public information, availability or rules:

(A) Each Department shall:

(1) Adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public

may obtain information or make submissions or requests;

(2) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the Department.

(3) Make available for public inspection all rules adopted by the Department in the discharge of its functions.

(B) Each Department shall make available for public inspection all decisions and opinions.

(C) No Department rule is valid or effective against any person or party, nor may it be invoked by the Department for any purpose, until it has been made available for public inspection as required by this Ordinance. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

Sec. 5-8-4—Procedure for rule-making:

(A) Prior to the adoption, amendment or repeal of any rule, each Department shall:

(1) Give at least 10 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time, place and manner in which interested persons may present their views concerning the intended action. The notice shall be mailed to each person who has made timely request of the Department for advance notice of its rule-making proceedings.

(2) Afford all interested persons reasonable opportunity to submit data, views or arguments, which may, in the discretion of the Department be submitted either orally or in writing or both. The Department shall consider fully all submissions respecting the proposed rule.

(B) If any Department finds that an emergency, reasonably constituting a threat to the public interest, safety or welfare, requires adoption of a rule upon fewer than 10 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than 120 days but the agency's authority to adopt an identical rule under subsections A (1) and A (2) of this Section is not precluded.

(C) No action by any Department to adopt, amend or repeal a rule after this Ordinance has become applicable to the agency shall be valid unless taken in substantial compliance with this Section.

(D) Any rules and regulations existing on the date prior to the effective date of this Ordinance may be adopted without compliance to these procedures.

Sec. 5-8-5—Filing and taking effect of rules:

(A) Each Department shall file in the office of the Village Clerk a certified copy of each rule adopted by it, including all rules existing on the date this Ordinance becomes applicable to the Department other than rules already so filed. The Village Clerk and the Department shall each keep a permanent register of the rules open to public inspection.

(B) Each rule hereafter adopted is effective 10 days after filing, except that:

(1) If required by Ordinance or specified in the rule, a later date is the effective date.

(2) Subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing with the Village Clerk or at a stated date less than 10 days thereafter, if the Department finds that this effective date is necessary because of emergency. The Department's finding and a brief statement of the reasons therefor shall be filed with the rule. The Department shall take reasonable and appropriate measures to make emergency rules known to the persons who may be affected by them.

Sec. 5-8-6—Petition for adoption of rules: Any interested person may petition a Department requesting the promulgation, amendment or repeal of a rule. Each Department shall prescribe by rule the form for petitions and the procedure for their submission, consideration and disposition. If, within 30 days after submission of a petition, the Department has not initiated rule-making proceedings in accordance with Section 5-8-4 of this Article, the petition shall be deemed to have been denied.

Sec. 5-8-7—Appeals: Any person aggrieved by the adoption, amendment or repeal of any rule under the procedures herein may request that the Village Manager place the issue before the appropriate committee of the Village Board. There shall be an opportunity for the aggrieved person or persons and the Department to present the merits of the issue before the Committee. The Committee shall make a recommendation to the Village Board. The Village Board shall resolve the issue by Resolution or Ordinance, as appropriate.

Sec. 5-8-8—Severability: If any provision of this Ordinance or the application thereof to any person or circumstance is

held invalid, the invalidity shall not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application, and for this purpose the provisions of this Ordinance are severable.

Section 2: That the Village Clerk is hereby authorized to publish this Ordinance in pamphlet form.

Section 3: That this Ordinance shall be in full force and effect from and after its passage, approval and publication.

PASSED this 3rd day of October, 1977.

APPROVED this 3rd day of October, 1977.

VOTE: AYES 5 NAYS 0 ABSENT 1

APPROVED:

/s/ Virginia M. Hayter
Village President

ATTEST:

/s/ Helen Wozniak
Village Clerk

Published in pamphlet form this 4th day of October, 1977.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties that were a pipe expert called to testify in the above entitled matter he would testify as follows:

1. That pipe smoking has been one of man's habits for well over 1,000 years.

2. That pipes have been and can be fashioned from almost any type of material to include but not limited to: iron; gold; silver; plastic; stone; platinum; jade; porcelain; mineral; glass; clay; shells; bone; and, wood. (See Exhibits Attached Hereto and Made a Part Hereof.)

3. That pipe bowls and stems are of various shapes and sizes and that shape and size is a matter left to the discretion of the user, there being marketed pipes in all sizes and shapes, made of all of the above materials, and others, as well. (See Exhibits Attached Hereto and Made a Part Hereof.)

4. That there is a nationwide market for pipes as collectibles (as evidenced by exhibits attached hereto and made a part hereof) in all of the above materials, new or used, functional or not, as even broken used pipes may have some collectible value.

Stipulated and Agreed:

Attorney for the Village of Hoffman Estates et al.

Dated:

Attorney for Plaintiff

Michael L. Pritzker
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that if DONALD R. LEVIN were to testify in this matter he would state as follows:

1. That he is the President of Adam's Apple Distributors Inc.

2. That the items enumerated on the evidence list attached hereto and made a part hereof were sold from Adams Apple Distributors Inc. and were identical or similar to items furnished by Adams Apple Distributors Inc. to Plaintiff.

3. That many of said items were imported from other states and other countries.

4. That when advised of the enactment of the subject legislation Adam's Apple Distributors Inc. discontinued selling almost all items, including those enumerated on Exhibit A attached hereto and made a part hereof, arguably within the ambit of said legislation because they were unable to definitely ascertain what items were specifically regulated and or prohibited by said Ordinance.

Stipulated and Agreed:

Attorney for the Village of Hoffman Estates et al.

Dated:

Attorney for Plaintiff

MICHAEL L. PRITZKER
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that if LARRY ROSENBAUM were to testify in this matter he would state as follows:

1. That he is the owner and operator of Flipside of Hoffman Estates, Inc., Plaintiff herein.

2. That the items ennumerated on Exhibit A attached hereto and made a part hereof were items marketed and sold by Plaintiff prior to May 1, 1978, the effective date of the subject Ordinance.

3. That said items and others were removed because they arguably fall within the ambit of the subject Ordinance.

4. That Plaintiff has lost and continues to lose thousands of dollars in sales and profits because they are uncertain what items are covered under the Ordinance.

5. That a prior adversary hearing as to the application of the Ordinanace to each and every item which may be sold would cost thousands of dollars and create repeated hearings and litigation each time a new product was introduced.

6. That Plaintiff does not sell millinery wear, tobacco or pharmaceuticals.

Stipulated and Agreed:

Attorney for the Village of Hoffman Estates et al.

Dated:

Attorney for Plaintiff

MICHAEL L. PRITZKER
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

EXHIBIT A

Plaintiff's Exhibits	Description
Plaintiff's Exhibit No. 1	Clamp
Plaintiff's Exhibit No. 2	"Guitar" Chain Ornament
Plaintiff's Exhibit No. 3	"Key" Chain Ornament
Plaintiff's Exhibit No. 4	"Alligator" Clip
Plaintiff's Exhibit No. 5	Key Chain
Plaintiff's Exhibit No. 6	Key Chain
Plaintiff's Exhibit No. 7	Key Chain
Plaintiff's Exhibit No. 8	Key Chain
Plaintiff's Exhibit No. 9	Necklace
Plaintiff's Exhibit No. 10	Earrings
Plaintiff's Exhibit No. 11	Earrings
Plaintiff's Exhibit No. 12	Earrings
Plaintiff's Exhibit No. 13	Cigarette Holder
Plaintiff's Exhibit No. 14	Cigarette Holder
Plaintiff's Exhibit No. 15	Necklace
Plaintiff's Exhibit No. 16	Glove Stretchers
Plaintiff's Exhibit No. 17	Scale
Plaintiff's Exhibit No. 18	Scale
Plaintiff's Exhibit No. 19	Scale
Plaintiff's Exhibit No. 20	Scale
Plaintiff's Exhibit No. 21	Strainer
Plaintiff's Exhibit No. 22	Strainer
Plaintiff's Exhibit No. 23	Strainer
Plaintiff's Exhibit No. 24	Pulverizer
Plaintiff's Exhibit No. 25	Squeeze Bottle
Plaintiff's Exhibit No. 28	Squeeze Bottle
Plaintiff's Exhibit No. 29	Tobacco Tin/Cigarette Holder
Plaintiff's Exhibit No. 30	Cigarette Holder
Plaintiff's Exhibit No. 31	Cigarette Holder
Plaintiff's Exhibit No. 32	Cigarette Holder
Plaintiff's Exhibit No. 33	Cigarette Holder
Plaintiff's Exhibit No. 34	Pipe
Plaintiff's Exhibit No. 35	Pipe
Plaintiff's Exhibit No. 36	Pipe
Plaintiff's Exhibit No. 37	Pipe
Plaintiff's Exhibit No. 38	Pipe

Plaintiff's Exhibits	Description
Plaintiff's Exhibit No. 39	Pipe
Plaintiff's Exhibit No. 40	Pipe
Plaintiff's Exhibit No. 41	Pipe
Plaintiff's Exhibit No. 42	Pipe
Plaintiff's Exhibit No. 43	Pipe
Plaintiff's Exhibit No. 44	Pipe
Plaintiff's Exhibit No. 45	Pipe
Plaintiff's Exhibit No. 46	Pipe
Plaintiff's Exhibit No. 47	Pipe
Plaintiff's Exhibit No. 48	Pipe
Plaintiff's Exhibit No. 49	Pipe
Plaintiff's Exhibit No. 50	Pipe
Plaintiff's Exhibit No. 51	Water Pipe
Plaintiff's Exhibit No. 52	Water Pipe
Plaintiff's Exhibit No. 53	Water Pipe
Plaintiff's Exhibit No. 54	Water Pipe
Plaintiff's Exhibit No. 55	Water Pipe
Plaintiff's Exhibit No. 56	Water Pipe
Plaintiff's Exhibit No. 57	Necklace
Plaintiff's Exhibit No. 58	Necklace
Plaintiff's Exhibit No. 59	Pins
Plaintiff's Exhibit No. 60	Herb Sifter
Plaintiff's Exhibit No. 66	Mirror
Plaintiff's Exhibit No. 67	Vials
Plaintiff's Exhibit No. 68	Cigarette Rolling Papers
Plaintiff's Exhibit No. 69	Cigarette Rolling Papers
Plaintiff's Exhibit No. 70	Cigarette Rolling Papers
Plaintiff's Exhibit No. 71	Cigarette Rolling Papers
Plaintiff's Exhibit No. 72	Cigarette Rolling Papers
Plaintiff's Exhibit No. 73	Cigarette Rolling Papers
Plaintiff's Exhibit No. 74	Cigarette Rolling Papers
Plaintiff's Exhibit No. 75	Cigarette Rolling Papers
Plaintiff's Exhibit No. 76	Cigarette Rolling Papers
Plaintiff's Exhibit No. 77	Cigarette Rolling Papers
Plaintiff's Exhibit No. 78	Tobacco Snuff
Plaintiff's Exhibit No. 79	Mirror

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed May 11, 1979)

IT IS HEREBY STIPULATED by and between the parties to the above entitled matter that if JOHN O'CONNELL, Chief of Police, Village of Hoffman Estates, Illinois, were to testify in this matter, he would state as follows:

That any pipe may be used to smoke marijuana. That an establishment selling pipes need not have a license as required by the challenged Ordinance, unless that pipe or other smoking item contained or displayed a phrase or picture which suggested a possible association with a controlled substance (e.g. a marijuana leaf). That such phrase or picture appearing on the otherwise lawful item subjects it to coverage under the Ordinance. That selling pipes or other smoking material in proximity to certain literature concerning drugs could also be the basis for the license requirement. That if an existing pipe store started to sell certain literature such as High Times and Stone Age they would then need an additional license and the sale of all pipes would then fall under the regulations and prohibitions of the statute. Mirrors notwithstanding any phrase or depiction are not covered by the Ordinance. Weighing Scales might be covered depending on the presence of a phrase or picture found on the Scale or its packaging.

The primary purpose of that part of the challenged Ordinance, which requires that merchants maintain a police register or record of purchasers, of those items sought to be regulated, is to discourage persons in the Hoffman Estates community from purchasing those items. That the requirement that all purchasers of items sought to be regulated sign a police

record, open to police inspection, serves to discourage customers, much the same way that requiring patrons of a motel to sign a guest register discourages certain persons from using the services of that type of establishment.

The Chief would not be able to state which specific items were covered by the Ordinance and would testify that determination as to which items actually fall under the purview of the Ordinance, at any given time would be left, in large part, to the judgment of detectives on his staff.

This stipulation is made to summarize Chief John O'Connell's statements with respect to the challenged Ordinance, a conference having taken place on May 1, 1979 with Chief John O'Connell, Richard Williams, Attorney for Defendants and Michael L. Pritzker, Attorney for Plaintiff, all present.

Stipulated and Agreed:

_____

Attorney for the Village of Hoffman Estates et al.

Dated:

/s/ Michael L. Pritzker
Attorney for Plaintiff

MICHAEL L. PRITZKER
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto that if HELEN WOZNISK, Clerk of the Village of Hoffman Estates, Illinois, were to testify in this matter she would state as follows:

That the subject Ordinance is a regulatory ordinance. That the ONE HUNDRED AND FIFTY AND NO/100 ($150.00) DOLLAR licensing fee was established by the Public Health and Safety Committee of Hoffman Estates, Illinois, to compensate the Village for the costs incurred in administering the Ordinance. That the general business license issued by the Village of Hoffman Estates carries with it a THIRTY AND NO/100 ($30.00) DOLLAR fee; that the additional cost of the license created by the subject Ordinance is assessed to compensate for those additional expenses incurred by checking the criminal records of the establishments' employees and for the monitoring of the police register the merchant is required to maintain.

It would further be the testimony of the Clerk of the Village that the ONE HUNDRED FIFTY AND NO/100 ($150.00) DOLLAR fee was based on the estimated cost to the Village of administering the Ordinance.

Stipulated and Agreed:

Dated:

Attorney for the Village of Hoffman Estates et al.

/s/ Michael L. Pritzker
Attorney for Plaintiff

MICHAEL L. PRITZKER
Attorney for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

STIPULATION
(Filed July 6, 1979)

IT IS HEREBY STIPULATED by and between the parties hereto that if called upon to testify DANA MALLEK would testify that:

He is a deputy Clerk of the Circuit Court assigned to the Circuit Court of Cook County, Illinois assigned to the Second Municipal District, Criminal Division.

He has been employed in that capacity for several years.

That in that capacity he reviewed the criminal court calendar for the Village of Hoffman Estates for the period July, August, September, October 1977 and July, August, September, October 1978 for violations of Illinois Cannabis and Controlled Substances laws. His search of said docket for those periods revealed that for the 1977 period there were 28 Defendants and 29 cases and for the same period in 1979 there were 62 Defendants and 62 violations.

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

* Note—all questioning for Plaintiff was conducted by Mr. Pritzker and reference to Mr. Leavitt as conducting examinations is in error.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. GEORGE N. LEIGHTON, one of the Judge of said Court in his courtroom in the United States Courthouse at Chicago, Illinois on September 1, 1978 at the hour of 10:00 a.m.

PRESENT:

MR. MARVIN LEAVITT
MR. MICHAEL L. PRITZKER
for the plaintiffs;

MR. RICHARD N. WILLIAMS
for the defendant.

[2] THE CLERK: 78 C 2114, Flipside Records vs. Village of Hoffman Estates, et al., hearing on temporary restraining order.

THE COURT: Will you tell me how much time this is going to take?

MR. WILLIAMS: I am sure we will be completed by noon, your Honor.

MR. LEAVITT: That is correct.

MR. WILLIAMS: Perhaps a half hour.

THE COURT: All right, let me just take a moment then and look at this again.

When it was here last, could you remind me what we did in this matter?

MR. WILLIAMS: I appeared, your Honor, and Mr. Leavitt was out of the state on another trial and it was continued to today's date. I understand we are here on their request for a temporary and permanent injunction.

MR. LEAVITT: That is not exactly correct. We appeared before you—

THE COURT: Who represents the plaintiff?

MR. LEAVITT: We represent the plaintiff.

For the record, your Honor, Marvin Leavitt of the law firm of Leavitt and Schneider.

MR. PRITZKER: Michael Pritzker, 134 North LaSalle.

* * * *

[6] LAWRENCE ROSENBAUM,
a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

THE CLERK: State your full name for the record and spell your last name.

THE WITNESS: Lawrence Rosenbaum, R-o-s-e-n-b-a-u-m.

BY MR. PRITZKER:

Q Are you an officer or director of the plaintiff which is Flipside Hoffman Estates, Inc.?

A Yes, I am. I am the secretary-treasurer.

Q Where is that corporation incorporated?

A In the State of Illinois.

Q What duties do you undertake as an officer of that corporation?

A I, along with my brother operate the corporation.

Q What business does the corporation have?

A Retail sale of records, tapes, related items, and also ticket sales through Ticketron.

Q Through what outlet does it maintain this business [7] or occupation? Where is this store located?

A The location is in the Barrington Square Mall which is at Hoffman Estates.

Q Does Flipside Hoffman Estates have any other stores or locations?

A No, but Flipside is a group.

Q No, I just asked you the question as to that?

A No.

Q So that store located in Hoffman Estates is the sole business of Hoffman Estates Flipside?

A Correct.

Q How long has that store been in business?

A Approximately two years and two months. It was opened the early part of June of '76.

Q Up to and through March of 1978, what merchandise was being offered for sale at that location?

A Phonograph records, tapes and related accessories, shirts, clothing for a short period of time, and tobacco, novelty devices and jewelry.

Q Did you offer any literature for sale?

A Yes, we sell Rolling Stone magazine, National Lampoon, High Times magazine and that's about it.

* * * *

[13] MR. PRITZKER: You see, one of the problems we are attacking in the ordinance, your Honor, is that the permit from its nature is so unfair we are not sure that what items we may or may not sell.

THE COURT: Did the plaintiff ever go and ask them?

MR. PRITZKER: Pardon me?

THE COURT: Did the plaintiff ever go and ask them and find out from the regulatory authorities what is the—I don't quite understand. Candidly, none of these ordinances are models of clarity. I have never seen one that is exactly a model of clarity.

MR. PRITZKER: We would like some—

THE COURT: But I had no trouble understanding this ordinance when I looked at it in connection with the motion for a TRO.

MR. PRITZKER: It is specific items that are restrictive. How does one know whether or not one is intended—designed or intended for use with an illegal drug, and there is also attached Exhibit C, the license guidelines. For example, if I may mention one other point, since we are talking about pipes, it says "If displayed away from the proximity of non-white papers or tobacco oriented papers and not displayed [14] within the proximity of roach clips or literature encouraging the illegal use of cannabis or illegal drugs not covered or otherwise covered."

So, for example, a pipe not near literature may become a prohibited item under the statute but if away from literature is an uncovered item. Well, the pipe hasn't changed its character by virtue of the fact that it is next to Harvard National Lampoon. Is that such literature encouraging the use of marijuana or—

THE COURT: All right. Suppose you pursue this line with this witness because I would like to know what items is it that the plaintiff is no longer selling because of this ordinance.

BY MR. PRITZKER:

Q Did you ever have any meetings with officials of the village with regard to what items specifically may or may not be sold in your store?

A I talked to Mr. Williams a couple of times regarding this entire thing.

Q Now you indicated some of the things that you are no longer selling are pipes, is that correct?

A That is correct.

Q Where did you display or sell pipes in the store prior to March of 1978?

[15] A They were displayed in glass showcases toward the front of the store near the cash register counter.

Q What instructions do you or your personnel give to purchasers with regard to the use of any of the merchandise sold in your store?

A Our employees are instructed not to—basically they are just to sell items. They don't instruct people how to use records and tapes, they don't instruct people how to use rolling papers and pipes and various other items.

Q What type of rolling papers did you offer for sale prior to March of 1978?

A A pretty general line of about 25 or 30 different brands of rolling papers. Basically the only difference between rolling papers are size although some of them are flavored and scented.

Q Subsequent to the passage of the ordinance, what, if any, papers do you now sell?

A We presently now sell only one white rolling paper.

Q Would you describe some of the jewelry items—I'm sorry, strike that.

Did you have any conversation with Mr. Williams with regard to the sale of papers at your store in Hoffman Estates?

A Yes. He was—he told me that white papers are [16] acceptable under the guidelines of the ordinance and he, in fact, sent me that sheet which shows the guidelines.

Q Were any of the colored papers, as far as you know, designed for use with any illegal substance?

A Not that I am aware of, no.

Q The pipes that you sold, did they all come or did any come with imprinted instructions in addition to any instructions that may or may not have been given by you in the store?

A No. All of the pipes come unpacked and contain no instructions at all that I am aware of.

Q Where did you maintain literature in the store?

A Magazines are generally kept near the cash register because they are a point of purchase type of item.

Q The pipes and other rolling papers, where were they kept?

A In the same general area.

Q Why is that?

A Because it is not a self-service type of item. Most of these items are too small and therefore very apt to be shoplifted if they are left unattended.

Q Did you have any conversation with Mr. Williams with regard to the sale of any of the items besides the rolling papers?

[17] A Generally, yes.

Q Do you recall the content of that conversation of what you were instructed to do regarding the sale of some of these items?

A He didn't give me any specific instructions. He did provide those guidelines, though.

Q Did he describe to you—well, let me start back.

Do you recall the four types of items that were set out on the license guidelines, the four categories?

A If I remember correctly, it was paper, pipes, literature and there was a general jewelry category but I am not exactly sure. It has been a while since I looked at that.

Q Do you recall that the license guidelines set out four categories, papers, roach clips, pipes and paraphernalia?

A Okay.

Q Now did you have any conversation which cleared up the definition of paraphernalia in terms of what, if any, of your items may have been intended to be covered under that guideline?

A No, not specifically, not with anybody specifically with the Village.

Q So the only guidelines that you had to go on with regard to the definition of paraphernalia was "If [18] displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs is covered," is that correct?

A Right.

Q So you have no other guidelines or assistance in terms of defining the word "paraphernalia" is that correct?

A That is correct.

Q With regard to pipes, did you have any conversation in addition to the guidelines set out by the village that would assist

in terms of the definition of pipes or controlling areas where pipes may be sold?

A No, not at all.

Q Other than the guideline which states that "Roach clips designed for use with illegal cannabis or drugs and therefore covered" fell within the guidelines, was there any definition of what a roach clip is?

A No.

Q You indicated that there were different guidelines with regard to papers, is that correct?

A Right. As far as colored papers versus white papers.

Q Was there any explanation or reason given why papers with colorful design or names oriented for use [19] with illegal cannabis or drugs were covered under that? That is, was there any explanation of colorful design?

A No, none that I recall.

Q Was there any reason why colored or flavored papers were prohibited where white papers were allowed?

A No, not that I recall.

Q What effect would continued compliance with the ordinance have on the store in Hoffman Estates?

A Because of the high profit nature of these items and the high cost of operation of such a large operation, it is very possible that the store will cease to exist without that additional profit.

Q What impact has been had on the store by not offering these items for sale?

A Aside from the immediate loss of income which I went into before, we have been getting a lot of feedback from the customers as to the fact that they are very dissatisfied with the present fate of that particular Flipside location and are now

doing their shopping in general at Woodfield where they can go and they can go to Marshall Fields and The Alley and Disk Records and Musicland and do all of their shopping in one location where they used to be able to do that at The Flipside.

Q Excuse me a moment.

[20] In order to obtain a license in order to comply with those items which you would be allowed to sell under the Village you had to sign an affidavit, is that correct?

A Yes.

Q You also had to acknowledge that you were selling certain covered items, is that correct?

A Right.

Q Did you know what items were covered from reading the statute?

A No, not really.

Q You were also required to maintain a ledger, isn't that correct?

A Yes.

Q What requirements did that impose upon your personnel when a purchase of an item was made—an item, let's assume, that you knew was covered, for example, colored paper.

A The ordinance required that we get the name, address, signature and exactly what was purchased from the customer.

Q Did the customer himself have to sign a log sheet or did you have to get information from him and sign it?

A I believe that there was a space for his signature.

[21] Q That was because you did not acknowledge that you were selling drug related paraphernalia, is that right?

A That is correct.

Q As a result of that you have been instructed not to sell those items as described in the ordinance?

A Right. Well, yes, and we have chose not to sell anything that may fall on either side because we really can't get a reading on exactly what is and what isn't covered by the ordinance except white papers.

MR. PRITZKER: I have no other questions.

THE COURT: Let me be sure I understand this: The items which the plaintiff no longer sells because of the ordinance are pipes, rolling papers and what else?

MR. PRITZKER: Jewelry items.

THE COURT: Jewelry.

MR. PRITZKER: Yes, sir.

THE COURT: Now we can agree, can't we, that the word "jewelry" does not appear in this ordinance.

MR. PRITZKER: Well, but it is intended and I think that it may be.

THE COURT: Well, how is it intended?

MR. PRITZKER: By paraphernalia.

THE COURT: I see.

* * * *

[23] I would like to know what literature.

MR. PRITZKER: So would we, but I assume, for example—

THE COURT: But this gentleman here who is testifying for the plaintiff, he must know.

BY MR. PRITZKER:

Q What literature? Were you ever given instructions as to what literature was included under the statute?

A No, we were not given specific instructions but rather than risk any problems or the loss of our business license or any arrests of our personnel, we thought it best to totally eliminate anything that would fall into the gray area until the entire matter is resolved.

Q What literature do you think might contemplate or fall within the gray area?

A Well, High Times Magazine, National Lampoon Magazine, even the Rolling Stone Magazine.

Q Any other books?

A Other books.

THE COURT: Magazines and books, we will get to that later.

Anything else?

BY MR. PRITZKER:

Q The ordinance also prohibited if you continue to sell certain literature to maintain the sale of your [24] pipes within the proximity of certain literature, is that correct?

A Yes.

Q Was "proximity" defined for you?

A No, it was not.

Q Is there any practical reason why you effectively do not offer pipes for sale in a different part of the store than that where your literature was maintained other than those reasons which you have stated?

A No, but not knowing what "proximity" is, even though it is a large store, it is still only 4,000 square feet and who is to say what proximity is.

Q That is 4,000 square feet but they are not all available to the customer, are they?

A Most of it is.

* * * *

[33] EARL W. MAURER,
a witness called by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE COURT: State your full name and spell your last for the witness.

THE WITNESS: Earl W. Maurer, M-a-u-r-e-r.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Earl, what is your occupation?

A Police Officer for the Village of Hoffman Estates.

Q How long have you been a police officer?

A About 11 and a half years.

Q What has been your assignment for the past year?

A I am assigned to the Detective Division.

Q In February of this year were you assigned to take certain photographs at the Flipside Record Shop in Hoffman Estates?

A Yes, I was.

MR. WILLIAMS: I believe, your Honor, by stipulation [34] of the parties, if Officer Maurer were to testify, he would testify that he took these pictures on February 7th at the Flipside, 1978, and they are true and accurate portrayals of certain display areas of that particular store.

MR. PRITZKER: So stipulated.

THE COURT: All right. So stipulated.

BY MR. WILLIAMS:

Q Officer, as to what is have marked as Exhibit F, a picture that is stipulated you took on that day, there is something marked "power hitters." In your experience of 11 years as a police officer, have you ever come across such an item or do you know what such an item is?

MR. PRITZKER: Objection. This testimony relates to February 7th which was prior to the effective date of the ordinance. At that point the merchandise offered for sale is not relevant.

MR. WILLIAMS: I think it is.

I think from your own testimony you have withdrawn all types of merchandise so we certainly wouldn't have any evidence that this is what the ordinance is directed towards. I think it is necessary to put in the record the types of volumes that were sold at that store that you were objecting to.

[35] THE COURT: What about that? As I understand it, those pictures show the items that were being sold on—February what?

MR. PRITZKER: February 7th, your Honor.

THE COURT: February 7th.

MR. PRITZKER: Yes.

THE COURT: And the ordinance was adopted February 20th, is that right?

MR. WILLIAMS: Effective May 1.

THE COURT: Effective May 1. But adopted, as I remember it, and it was voted on on February 20th.

MR. WILLIAMS: Correct.

THE COURT: Effective May 1.

Now the pictures you have there show a display on February 7th?

MR. WILLIAMS: That is correct.

THE COURT: What is the point of those pictures now with relation to the—

MR. WILLIAMS: To indicate to the Court what type of items were being sold and the presumptive uses of those items at that store.

THE COURT: Are those the same items that were sold—oh, I see, those are the items that the plaintiff says it discontinued because of the ordinance, is that right?

[36] MR. PRITZKER: That is right.

THE COURT: All right. Then the objection will be overruled.

Proceed.

BY MR. WILLIAMS:

Q Officer, do you know what a power hitter is?

A A power hitter is a plastic bottle with a hole in the top large enough for a cigarette to be put into so that it collects the smoke that burns from the burning end of the cigarette and then goes back through the cigarette to the smokers mouth to avoid losing any of the smoke into the air, gaining greater value of the use of the tobacco or whatever is being burned.

Q Officer, in your experience of 11 years, have you seen items such as described by the previous witness as roach clips worn around the necks of any youths that you dealt with or any other parties?

A I have seen them worn on people.

Q Have you also ever seen them in active use?

A Yes, I have.

Q From those experiences do you recall whether they were all or some tobacco use or all or some non-marijuana use?

A Whenever I came in contact with someone using [37] what is called a roach clip to smoke the item that is being smoked it was always found to be cannabis.

Q Officer, have you come in contact with what is known as a bomb pipe?

A Yes.

Q Have you seen persons in the community using such an item?

A Several times I have seen it.

Q Do you recall what was used with that type of pipe?

A Generally analysis shows that it was cannabis that was being smoked.

Q Was there any—you say generally. Was there anything else that was ever found to your knowledge?

A I believe there was one time that regular tobacco was being smoked in a bomb pipe.

Q Officer, have you yourself ever rolled your own cigarettes?

A No.

Q Have you seen marijuana cigarettes that have been rolled?

A Yes, I have.

Q What type of paper, if any, was used in your recollection?

A Cigarette rolling papers of various colors and [38] some are scented.

Q Have you seen it with just simple white papers as well?

A Yes.

Q Have you also seen farmers in the community using simple white paper?

A I have never noticed them.

MR. WILLIAMS: I have no further questions.

THE COURT: Cross examination.

CROSS EXAMINATION

BY MR. PRITZKER:

Q When you were in the store on February 7, 1978 and took these photographs, did you read any of the literature that you had taken the photographs of?

A You mean books and magazines?

Q Yes.

A No.

Q Did you have a conversation with any of the personnel that was there with regard to any of the items?

A Briefly, yes.

Q Officer, are you familiar with the expression "You can't tell a book by its cover"?

A I have heard it.

MR. PRITZKER: I have no further questions.

* * * *

[60] RICHARD M. WILLIAMS,
a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Please be seated. State your full name for the record.

THE WITNESS: Richard M. Williams.

DIRECT EXAMINATION

BY MR. LEAVITT:

Q Mr. Williams, you are employed as the Village Attorney of Hoffman Estates?

A That is correct.

Q How long have you been so employed?

A I have been employed by the Village of Hoffman Estates since September 1973 in the capacity of prosecutor and since February of 1977 in the capacity of Village Attorney and prosecutor.

Q In your capacity as village attorney, did you have occasion to be called upon to consult with regard to a village ordinance, the ordinance in question, village ordinance 1978-917?

A Yes.

Q Did you draft the ordinance which is in dispute here?

A Yes.

Q Did you also draft the guidelines which were [61] issued with that?

A Yes.

Q How did it come to you to draft the ordinance? Which steps were taken in the administrative procedure so that you came to draft the ordinance?

A The village Board is divided into six committees, and the Committee on Health, Safety and Welfare directed the attorney to draw an ordinance to ban or regulate or zone as to matters of drug paraphernalia sales in the community.

Q Were you a party at the hearings which undertook—which were undertaken by that committee?

A I may have been. I come and go on those Monday nights.

Q Do you know what evidence while you were there or are you aware of what was undertaken by the village in order to draw the conclusion and issue to you the instruction to draw the ordinance?

A I recall Trustee Collins, whose offices are adjacent to the Flipside Records Store, indicated his concern with the youth in the area buying these things and being observed smoking with these items.

Based upon his representations and further discussion, the motion came to fruition.

Q Was there any expert testimony called by the [62] committee in order to establish the use of the items sought to be regulated?

A I don't recall whether the police department was consulted or not.

Q Do you know if any independent persons or experts were called upon or if any reports or statistics were submitted in order to give the committee a factual basis upon which to reach a conclusion?

A To my knowledge, no.

Q What direction were you given with regard to writing the ordinance in question?

A The direction as I testified to earlier with broad guidelines to either ban or regulate or set up zoning districts.

Q So it was you that selected the form and mode that the ordinance finally took?

A That is correct.

Q Subsequently the ordinance was submitted back to the committee for approval, is that correct? Do they pass on it in committee before the City Council does?

A The ordinance went directly to the village Board for a first reading after the direction by the committee.

Q Were you present at the Village Board meeting when it was voted upon?

A Yes.

[63] Q What, if any, expert testimony was presented to the Village Board in consideration of the question?

A None.

Q In there you also as a part of the enforcement section of the ordinance created a police ledger?

A Pardon?

Q A police ledger was made part of the ordinance; that is, to have persons sign a ledger when certain items were purchased?

A A journal or ledger required to be kept by the shopkeeper, yes.

Q And a special license was also authorized to be issued for the items intended to be covered under the Act, isn't that correct?

A That is correct.

Q In the sale of any of those items, somebody had to sign this ledger, is that correct?

A That is correct.

Q Did the police have access to that ledger under the design of the ordinance?

A Yes, they would.

Q Did you have any conversation with the Chief of Police with regard to the enforcement of that section?

A Yes, sir, I did.

Q When did those conversations take place?

A They would have taken place between the time of the direction to draw the ordinance and the final passage.

[64] Q What was the purpose of the police ledger?

A I discussed with the chief the Controlled Substance Act that requires this for low grade controlled substances and advised him on Fourth Amendment or privacy questions being publicly known. This would be a free choice similar to airline magnometers; that there was no case law in the State of Illinois that used the Uniform Controlled Substance Act and our position on those types of ledgers claiming any chilling effect or anything of that matter; what manner or use you could make of that information in observing or detecting such dealings and use in the community.

Q And did you advise him that in fact he had a right under the ordinance to inspect, to see who purchased any of the items covered under it?

A Yes.

Q Did he have a right to make copies or write the names of the individuals who purchased any of the items?

A I did not say it in so many words.

Q Does the ordinance, in your opinion, allow it?

A Yes.

Q Did you have any conversations with the police chief subsequent to the passing of the Act with regard to its enforcement?

[65] A I have had conversations regarding the Act but I can't recall any as to the enforcement effort. Our studies and survey by our health department showed only one merchandiser that would continue to have that type of merchandise and enforcement never became an issue.

Q And what merchandiser was that?

A The Flipside Store.

Q When you say items like that, the ordinance refers to, for example, paper and it has a caption and it talks about white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. I assume by that it means it may be displayed without somebody buying it and signing a police register, is that correct, or does that mean that they may be displayed at all?

A They may be displayed if they are displayed in such a manner that they are not designed to market it for use with illegal drugs.

Q Now in any of the considerations given, were there any design differentials brought to your attention between Cannabis and cigarette designed papers?

A Yes. I made my own investigation.

Q And what design differential between papers did you find?

[66] A I found in most stores it is white paper or some colored paper. In the Flipside store it had connotations of use with Cannabis and was placed with roach clips and with other items that could be presumed to be used only with illegal Cannabis or drugs.

Q Presumed by whom?

A Presumed by the information I received from the police department and on the use of roach clips.

Q When you say a roach clip, what are you referring to?

A Having never used one and not looking at one, what I am referring to and would understand would be an item that holds a hot burning cigarette so that one can get down to the last puff because of the intense heat of marijuana as compared to tobacco.

Q Let me show you what has been marked as Plaintiff's Exhibit No. 1 in evidence. I ask you if you can describe that item.

A It looks like a pair of scissors that doesn't open up.

Q It is, in fact, a hemostat, a surgical clamp. You squeeze it together and it opens up. Did you, as a matter of fact, in your examinations, ever go to Flipside Records?

A I am a regular customer, both as village attorney [67] and as a customer I have observed the items.

Q Did you have occasion to observe these items on sale prior to enactment of the ordinance in this section where cigarette papers were sold?

A I can't recall seeing that item. I saw items.

Q Now you talked about the heat of the cigarette. In that regard, are there not, in fact, many systems which produce the heat and filter of cigarettes?

A I am not a cigarette smoker. I would speculate that if we could put a man on the moon, we can reduce the heat of a cigarette.

Q Have you ever in your experience, outside your role as village attorney, viewed what is numbered Plaintiff's Exhibit No. 64 which purports to be Aquafilter, a cigarette filter which has a filter filled with water? Have you seen those or seen advertisements?

A I think I have heard the word. I haven't seen them before.

Q And would that have the same effect of reducing the heat and hold a cigarette down to the very last bit as a roach clip?

A I don't know.

Q What would the purpose be of Flipside records selling hemostats or medical clamps?

A Well, they are not a licensed pharmacy so I would [68] imagine it depends on how they market it. If they market it with Winston's and Camel's and L&M's and other tobacco users, it would be for tobacco use.

If they market it with other items that the police tell me they have found in evidence with traces of cannabis and other items, then they are marketing it for use with marijuana,

Q When you say "marketing for use" you've had occasion not only to be in the store but to cause measures to be taken prior to enactment of the ordinance, isn't that correct?

A Yes, that is correct.

Q What signs existed telling people what the use of these items were?

A I don't recall. If you wish to refresh my memory—

Q I will show you what has been marked as Item No. 16 for identification purposes and ask if you can examine that and describe that or if you know what that is?

A It looks like a large clothespin. It closes tight on an item, similar to the last item you showed me.

Q Now were you aware or did you see any of these items for sale in Flipside Records prior to May 1, 1978?

A I don't recall seeing that item.

Q And if these items were present there, is it [69] the import of your ordinance to legislate the control and regulate the control of these items if they are sold in the same areas as cigarette papers?

[69] A Not cigarette papers alone.

Q If sold in the proximity of the cigarette papers and literature?

A There is nothing wrong with literature, per se.

Q Well, you have described literature encouraging the use of marijuana and other illegal drugs, is that correct?

A That's correct.

Q Does your ordinance or statute give any guidelines so that one may tell what such literature is?

A No, no guidelines have been drawn to define that and the literature itself has not been regulated in any manner.

Q Then whether or not a piece of literature encourages the use of illegal drugs and whether they would be subjected to the license if sold in the proximity of pipes then, would be in the discretion of whom and how would one establish that?

A It would be set up by administrative procedure as to the manner of marketing. I think that is the reason for the guidelines.

[70] I do recall a picture showing one piece of literature—now I may be wrong—that had something to do with the use of cocaine and something to do with "A Child's Garden of Grass" or marijuana. Those things struck me as items, when displayed with the others, that are marketing the items that you have shown me, No. 1 and No. 16 to be used—

Q The hemostat, No. 16 and the glove stretcher?

A Right, to be used with cannabis, other types of drugs, rather than tobacco oriented products.

Q Did you read either of those books?

A No.

Q Were these items referred to in those books?

A I have no idea.

Q In fact, did any of those books encourage the use of any marijuana or illegal drug?

A I have no idea.

Q So it was judged solely on their titles?

A The manner of display and marketing is what we were concerned about.

Q Let us get to the manner of display. How were these books displayed, in a wire rack?

A As I recall, they were placed behind the glowing and colorful items similar to those on your table, [71] in one particular area of the store.

Q That was the cash register?

A Well, I think there is one towards the front and this is one towards the side. There may be two cash registers. The record sales and ticket sales were primarily at the front of the store. As I recall, these were on the west side of the store.

Q And so the proximity of literature to these other items may create the store falling under the ambit of the ordinance and a tax would have to be paid, is that correct?

A The marketing effect, yes.

Q Now is there a difference as to whether or not there is a certain design or a decal would be on some of these items as to whether or not it would be intended for use with marijuana or illegal drugs?

A Maybe the identification, in our opinion, is more readily identifiable as an item designed for the use with illegal drugs because of the language on the items.

Q For example, was it intended by the ordinance to regulate certain cocaine paraphernalia which you believe to be cocaine paraphernalia?

A I believe that would fall under illegal drugs under Illinois Revised Statutes. I frankly have no idea what cocaine paraphernalia is. I don't know how it is used or what cocaine is.

[72] Q Well, could they sell things which you determined to be cocaine paraphernalia?

A Under this definition, no.

Q How would one know whether certain items were, in fact, cocaine paraphernalia?

A Based upon the experienced and trained observer giving us advice prior to our administrative hearing.

Q Have you ever heard the expression "cocaine vial"?

A No.

THE COURT: Cocaine what?

MR. LEAVITT: Cocaine vial.

BY MR. LEAVITT:

Q Have you ever heard the expression of a "cocaine mirror"?

A No.

Q Were certain of the items which were exhibited for display also exhibited as jewelry items?

A They could have been. I don't recall.

Q Let me show you what has been marked as Exhibit No. 12 for identification purposes.

A What number was that? Okay.

Q Would you describe Exhibit 12?

A It looks like earrings.

Q Would your ordinance intend to regulate the control or sale of these earrings?

[73] A No, counsel, unless—because I have such a limited knowledge of drugs and trained and experienced officers could tell us that they found those items used with some exotic substance and that is the purpose of them. My own opinion is that it looks like earrings to me.

Q If, in fact, they were earrings whose use could also be roach clips, would their sale be regulated?

A I don't think that would necessarily make it presumptive. There must be rational, logical connections between what we find and what the use is.

Q Suppose, for example, that those same items were contained in Exhibit No. 10. Would you describe Exhibit No. 10 to the Court and for the record, please?

A It says "Roach clip earrings."

Q And on the back it says "Express yourself in genuine miniature roach clip earrings, 100 percent handcrafted."

A With quality—

Q Would these items be regulated under your ordinance?

A I don't believe so, unless an expert trained and experienced in the field could say that he has found those to be used with illegal cannabis and drugs. Those state they are miniature and it may simply be a cute type of [74] earrings mimicking something that is illegally on the market.

Q Well, how do we know under the ordinance when a roach clip is designed for use with illegal drugs prior to the time the merchandise is displayed?

A Based upon a regulation hearing wherein all merchants within the community would have an opportunity to cross examine and question the trained and experienced observer who has stated, signed by affidavit, that these items have been found to be used primarily with illegal cannabis or drugs.

Q In other words, there would have to be a hearing on each and every item?

A Conceivably.

Q In your other 80 items which you regulate, such as milk, does every time milk comes in—is there a new hearing?

A Every time we change a regulation on milk we have an administrative hearing.

Q What are some of the other 80 things that you regulate?

A Service stations, hospitals.

Q Are there any other retail establishments that you regulate and require each and every item to be [75] subjected or submitted to a hearing on prior restraint as to whether or not that item may be sold subject to regulation?

A A department store, we may examine the various departments. If they have a bakery, if they have a pharmacy, if they have various departments, they would need separate licensing. Those would be some general items of what constitutes a pharmacy, you know. We would have to look a little further.

I think I can say we don't look at every item of every store. All this ordinance certain contemplates we may well have to regulate items designed and marketed for use with illegal drugs or cannabis.

Q Now let me show you again Exhibit No. 10, the roach clip earrings, holding a hand-made tobacco cigarette. Is this the function you described your roach clip served?

A That is correct.

Q So that earring also serves that purpose, doesn't it?

A Apparently so.

Q Now it has a dual purpose, either earrings or roach clips. Is it covered under the ordinance?

A Only if I have evidence from a trained and experienced officer that can state there is that logical and rational condition in more—well more then a majority of cases where he has observed its use.

[76] Q So, in fact, any specific roach clip may be sold or, rather, there has to be a hearing on each and every thing that may be used as a roach clip to discern whether or not it is, in fact, designed or marketed for use with marijuana?

A Not necessarily, counsel. If a store determines that it needs such a license and sells one or more items then it must have that license, whether it is one item or 100 items.

Q Are you familiar with the alligator clip type of roach clip?

A Not offhand.

Q Do you know what an alligator clip is?

A I know what it is in electronics.

Q If you were told, for example, that this Plaintiff's Exhibit No. 6, which is a keychain with an alligator clip attached, is commonly used as a roach clip, would that item then be regulated under your ordinance?

A Yes, it would.

Q It would then be unlawful for somebody under 18 to buy that keychain with an alligator clip attached?

A If it is designed and marketed for use with illegal drugs or cannabis, yes.

Q The design hasn't changed, it is a keychain with a roach clip, is it not—that is, an alligator clip?

[77] A Yes.

Q And what would be the other aspect to consider then, market it? Then it would matter, counsel, who marketed the item or how they marketed it?

A Not necessarily. The ordinance says designed or marketed.

Q Would you regulate, for example, Plaintiff's Exhibit No. 18 which are alligator clips shown in an Ace Hardware Store in your town?

A No, it looks like it is designed and marketed for use for electrical connections.

Q They are, in fact, a selection of alligator clips, is that not correct?

A That is correct.

THE COURT: That is exhibit what for the plaintiff?

MR. LEAVITT: That was Exhibit 80, your Honor.

THE COURT: 80?

MR. LEAVITT: Yes, sir.

BY MR. LEAVITT:

Q What design differential between the alligator clip displayed in Exhibit No. 6 and the alligator clip displayed in No. 80?

A The design and marketing of the—

Q I asked only about design. Is there any [78] design differential?

A No.

Q Now if I were to tell you that Exhibit No. 6 was sold in a Flipside Records without any signs but merely there where literature was displayed, where the literature that contained, The Child's Garden of Marijuana or whatever other literature they displayed, would it then be a regulated item?

A It would be if an officer could tell me that it can be used or is presumed to be used for illegal cannabis and drugs.

Q Does your ordinance contemplate control or regulation of those things which you have defined in the guidelines under your words as "roach clips"?

A The ordinance regulates paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs. It does not specifically state roach clips.

Q I was referring to the guidelines which specifically says—

A Those that are designed for use with illegal cannabis and drugs are therefore covered.

* * * *

[82] Q Are those papers regulated?

A Under my guidelines, based upon the fact that I have observed farmers using white paper and why I specifically exempted that without a hearing and due process, I drew up the opinion that white paper would not be regulated and that is white paper.

Q You talk about due process. Apparently there is some part in your ordinance that indicates that there is an administrative right to regulate each and every item they intend to sell. Is that set out in the ordinance in question?

A It is Section E. "The applicant shall comply with all applicable regulations of the Department of Health Services and the police department. Those regulations have not yet been issued because we have had no applicant for a license as yet. And those regulations are then governed by a separate ordinance that is similar to your Federal Estate Administrator's Procedures Act that gives notice and hearing.

Q And that would be on each and every item in this?

A In this case it may very well be.

THE COURT: May I ask, where is the Administrative Procedures reviewed under this ordinance?

THE WITNESS: At the Village Hall by the village department head.

THE COURT: All right.

MR. LEAVITT: Let me have one second.

BY MR. LEAVITT:

Q Now the only guidelines that have been propounded to date are the guidelines you have prepared, is that correct, with regard to the ordinance?

A These were the initial guidelines that—yes, those are the only ones that I am aware of as to health. I believe the police did hold a hearing, the police chief did promulgate some regulations, if I recall. You may well want to question him on that.

Q Now the expression, "After all, it is only a weed that turns to a flower in your mind," did it in any way affect the marketability of Exhibit 69, the white one and a half cigarette papers?

A It affects the marketing but I don't think we can [84] make the presumption. We may be able to. The white paper is presumed to be used for cannabis. That is required under our ordinance.

Q Have the regulations been propounded so that individuals who are selling merchandise—have notice of what may or may not be covered under the ordinance, other than those guidelines which you have issued?

A No.

Q So then the only thing the public has notice of is that which has already been issued, is that correct?

A At this point, yes.

Q They may be selling these very same items but not have a license?

A Correct.

Q Because of compliance?

A I don't understand "Because of compliance."

Q Well, that is, for example, they may sell literature in a separate part of the store so they can avoid the $150 tax?

A They could.

Q And the only thing they would have to do in some instances is just move the literature to a different part of the store to avoid the tax?

A That would affect the marketing.

* * * *

[87] Q Then were they given notice of specifically what items constituted a violation?

A They were given notice of the ordinance.

Q Only the existence of the ordinance itself?

A That is correct.

Q In fact did you have any conversation with one of the principals of Flipside?

A He has called me on the phone several times.

Q That was Mr. Larry Rosenbaum?

A Larry or Carl, I don't remember the name.

Q Do you recall a conversation taking place specifically on April 27, 1978 at approximately 1:20 p.m.?

A Please refresh my memory.

Q Did you make any notes of the conversations that took place between Larry Rosenbaum and yourself?

A Never.

Q Did you have any conversation about what items should be covered and what items the sale of which would require signing the police register?

[88] A I may have. I don't recall.

Q Do you recall Mr. Rosenbaum telling you he was unclear about what items were covered and you stated that it would be best if a retail record be used for all items in the section or area of the store whether covered or not?

A For his protection, yes.

Q So in fact when he called you for guidance as to what items would be covered and for the sale of what items they had to sign the police book, you advised him to sign it for everything just to make sure, isn't that correct?

A That may well be.

Q Did you tell him or did anybody advise him specifically when a police register was necessary?

A We had the register prepared for anybody that applied for a license. Nobody applied.

Q But he told you he didn't know when it was appropriate and when not, and you said "Well, then, always use the register," isn't that correct?

A It may well be.

Q Would that not have affected the rights of some individuals who may not have had to sign the police register? That is, the items they bought, an adversary hearing would have proved was not covered under the ordinance?

[89] A Yes, but the ordinance had not been implemented at that time.

Q When you say it had not been implemented, did not, in fact, an inspector from the Health Department go around and tell these people that they couldn't sell covered items without a license?

A I don't know what he told them.

Q You indicated that a health inspector went around and advised 13 or 14 establishments that they needed a license to sell certain things.

A No.

Q I am sorry. If I misunderstood you, please—

A I requested the health officer to see if under these guidelines and the ordinance they were selling them and provide them a copy of the ordinance.

Q So then it would be up to the understanding and comprehension of the individual store owner to know whether or not the items he was selling were intended or, in fact, were covered under the ordinance, is that correct?

A At that point, yes.

* * * *

[93] Q How would a person know whether or not he was covered under the ordinance by virtue of the items he was selling; that is, whether or not the items that he sold were decorative jewelry such as roach clip earrings, glove stretchers or other items, or whether or not they, in fact, were roach clips as covered by the ordinance and he required an application?

A That again would depend, as I spoke about that one earring, on the marketing aspect of the item.

Q When you say the marketing aspect, you referred to this often; what is the key in the marketing aspect and how is that reflected in the ordinance?

A The ordinance only refers to the marketing. The key is when you have all of those items such as that are on your table, one through 80, many of which when displayed with tobacco, displayed elsewhere in the store, may well not be designed and marketed for illegal use, but when displayed together create one marketing concept of illegal use with illegal drugs.

Q So proximity alone is sufficient to change the existence of—rather, the relevance and category of an item, the rubric under which it falls, from an uncovered to a covered status, is that correct?

A That is correct, under the marketing requirement.

[94] Q What are the guidelines that you propounded with regard to pipes?

A If displayed away from the proximity, non-white paper, tobacco oriented paper, and not displayed within proximity of roach clips or literature encouraging use of cannabis or illegal drugs, are not covered; otherwise covered.

But what we are saying is those papers that we may smoke with tobacco in contemplation displayed with tobacco clearly have the presumptive use of being used with tobacco. I think the nature of the marketing changes the presumptive use when they are placed with other items such as roach clips and those mentioned that would be illegal.

Q Take Exhibit 45 which purports to be a Meerschaum pipe. The evidence will establish that Exhibit 45 is such a pipe as was sold by Flipside Records prior to the enactment of the ordinance and prior to the time they were notified they fell within the ambit of the ordinance. Take Exhibit 16 and Exhibit 1. That is the hemostat which I referred to as clamps because I couldn't spell hemostats and the glove stretcher.

Now has the character of the pipe changed in any way?

A Of course not.

[95] Q Has this relationship to the ordinance changed in any way?

A Yes.

Q What is that?

A It was placed with other items that in and of themselves may be inoccuous but when taken together such as one that

could be used with electrical connectors, one to stretch gloves and one for mere pipe smoking and marketed not in the pipe rack department, not in the glove stretching department, but marketed together, falls—or becomes the presumption that these are being marketed for illegal use.

Q Now you said that you didn't recall any signs with regard to indicating that these were for use with illegal drugs, is that correct, in Flipside prior to May 1st when these items were displayed?

A No, I don't remember such a sign.

Q Would the same be true of all pipes, whether they be Meerschaum or corn cob pipes such as displayed in Exhibit No. 61, in terms of their relationship to the ordinance if displayed next to other merchandise that they would be covered and an extra license would be required?

A I think that would create the marketing aspect of the marketing—of the ordinance.

* * * *

[97] VIRGINIA M. HAYTER,

a witness called by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Please be seated. State your full name for the record and state your last name, please.

THE WITNESS: My name is Virginia M. Hayter, H-a-y-t-e-r.

DIRECT EXAMINATION

BY MR. LEAVITT:

Q You are the President or the Mayor?

A I am Village President.

Q Of Hoffman Estates?

A Yes, sir.

[98] Q And you were so employed on May 1st, 1978 when this ordinance which is the subject matter of this action became effective?

A Yes, sir.

Q As a matter of fact, you broke a tie vote of the Village trustees in order to enact the ordinance, is that correct?

A Yes, sir.

Q Were you aware of any guidelines that were propounded in order to supposedly clarify the ordinance for merchants in your town so that they would know what action was required of them to comply?

A I am not aware of the specifics. I do know the village manager was detailed to work with the attorney, Mr. Williams, to do so.

Q And those guidelines were to explain the ordinance and to give notice as to what was required of people in order to fall within lawful conduct under the ordinance, is that correct, to know what was expected of them?

A In a general way, yes, sir. That is standard operating procedure for any new ordinance.

Q What is paraphernalia designed or intended for use with illegal drugs?

A I am not an expert in that. I could not answer that question, sir.

* * * *

[111] Q You are prohibiting the sale of these things to minors, isn't that correct?

A In that sense, we are saying—in that instance, yes.

Q Fine. Then you are prohibiting in some instances and you are regulating it in others; do you prefer that better?

A I think that would be a truer—

Q All right. What is it that you are prohibiting and/or regulating?

A The ordinance attempts to—not to encourage people to break the law by encouraging the manufacture and the sale, the distribution of illegal substances and in this sense, that is what we were attempting to do for the health and safety of the community.

Q In other words, the purpose of this ordinance was to control the use of drugs.

A No.

Q Well, you said illegal substances.

A To make sure that we didn't aid and abet, that [112] the village aided and abetted that. Drugs are illegal.

Q Well, did you regulate by this ordinance any drugs?

A Specifically?

Q Yes.

A No.

Q What is it that you did specifically regulate?

A We license the paraphernalia, the materials that could be used illegally.

Q Now when you say "could be used," it is that that I want you to explain. Will you please describe what could be used with illegal drugs?

A A great many items.

Q And is the sale of all of them—

A Specifically made for that purpose.

Q And how would one know if something is specifically made for that purpose?

A In the general—now I have to speak as a lay person and not as an expert. As a parent of five children and as a mayor—

Q I am sorry.

MR. LEAVITT: I ask that that be stricken as not responsive.

* * * *

[115] Q Now this item—

A We have few stores that sell gloves in our community.

Q In other towns where you may have bought gloves outside of Hoffman Estates?

A No, I have never seen that.

Q If this item were sold in conjunction with other things—well, say it was sold with the hemostat. Would this be, from your viewpoint, covered under the ordinance, that is, Exhibit No. 16?

MR. WILLIAMS: Objection.

THE COURT: What is the objection?

MR. WILLIAMS: I don't see where this line is going as to where the legislators make a determination in this court as to each item speculatively whether, in fact, what they intended.

THE COURT: No. The objection is overruled. The plaintiff apparently has a theory about this. Let the question be asked and let us find out if we can. The objection is overruled. Proceed.

BY THE WITNESS:

A Please, will you ask the question again?

THE COURT: Would you repeat the question or have the court reporter read it.

MR. LEAVITT: I will ask the reporter to read it.

[116] (Question read.)

BY THE WITNESS:

A No, I don't think so, now that you have told me what its purpose is and the purpose happens to be for usage in a glove shop.

BY MR. LEAVITT:

Q Suppose this item were sold at the Flipside Records next to this rolling papers prior to May 1st; would you have a license in order to sell Exhibit 16?

A I can't answer that question because—

Q Is that because the definition of paraphernalia is too vague?

A No. Because I don't believe—I don't believe that that particular item would be an item that would be sold for the use. I don't think that kind of an item would be sold. The hemostat may very well be because yesterday I saw a hollowed out bolt that was used in illegal drug usage and nobody would have assumed that that machine bolt held cocaine, but it did.

Q Now, if Flipside Record sold that machine bolt, would they need a license to do it, to sell those things?

A Of course not.

* * * *

[120] Q So, in fact, then your ordinance contemplates regulated colored or flavored papers but not plain white paper?

A I haven't read the ordinance in some months but as I recall, there is a differentiation in papers. I can't recall what they are, sir.

Q Would you like a copy of the ordinance and the guidelines to refresh your recollection?

A I have never seen the guidelines. As I told you, they were prepared under the direction of the Board to the village manager. The village manager works in conjunction with the attorney. Those guidelines, as far as I know, have never been enforced, nor have they ever been reviewed for the simple purpose that Flipside chose [121] this route rather than to discuss. So I have not seen the guidelines, sir. I do not know what they are.

Q Are white cigarette papers such as displayed in Exhibit No. 68, such papers as you described before that would not be regulated by the ordinance?

A I don't know whether or not this particular one would be, sir. As I recall, the discussion was that most of the foreign papers have a higher—what is it, burning capacity and, therefore, many of them are used because of the need with drugs, to have a better ash.

So, it may very well be because this is, as you put in front of me, one made in France, it may very well be that this would be one. I do know that there are others that we were not given specifics on but we were given the general item.

Q What effect would papers have that have such things on them that "after all, it is only a weed that turns to a flower in your mind," such as the papers on Exhibit No. 69?

A I think among the younger generation, that would be considered a take-off on, you know—they look at these things differently, whether or not they are legal or illegal and to some it would mean one thing and to some other people it would mean some other things.

* * * *

[127] Q I am talking about literature right now.

A All right.

Q If that were contained in literature that was sold at Flipside, would that be the type of literature which you described as encouraging—

A We are talking about displaying literature that—

Q Let us say that book is displayed.

A —that encourages the illegal use of drugs.

Q Would you say that encourages the use of cocaine?

A That gives one person's opinion about what cocaine meant to him.

Q What does encouragement in order to fall into the ordinance require? How does one know if literature is encouraging?

THE COURT: I think we have gone far afield in this matter now.

MR. LEAVITT: Your Honor, if I may.

THE COURT: I have been reading this ordinance as the questions have been asked. The ordinance has nothing to do with literature.

MR. LEAVITT: Your Honor, it does, if taken in conjunction with the guidelines with the guidelines which place a tax on literature which is in the area. The guidelines are essential.

* * * *

[129] MR. LEAVITT: Except if I sold that literature in the back of the store, I would still have no tax. If I sell it in the front of the store, I now have to pay $150. What is being taxed, the pipes which I was already selling or the literature which I have now added?

THE COURT: $150 for what?

MR. LEAVITT: For the license to sell paraphernalia, because under the ordinance, your Honor, pipes if dis-

played away from the proximity of non-white paper or tobacco oriented paper and not displayed within the proximity of roach clips or literature encouraging—

THE COURT: By the way, have you gentlemen agreed about all this? Do we have to hear any evidence about all this? This is not a subject of disagreement it seems to me, because what this ordinance says and what these guidelines say is a matter—I can read these guidelines. I don't need any witness to tell me what papers, what roach clips are and what pipes are. I know the meaning of paraphernalia. I don't need any witness to tell me because the general rule of construction is that any legislative enactment, whether it is an ordinance or a statute, no matter how the words might have been intended, they are to be given their ordinary meaning which the ordinary person

* * * *

[132] You notice it is after 4:00 o'clock and we have just started. This case was set for hearing today on the representation that it wasn't going to take long to hear. That's the only way I set cases like this.

MR. LEAVITT: I am sorry, your Honor. It was my understanding that if we couldn't complete today, successive Fridays—

THE COURT: I know that, yes, yes.

MR. LEAVITT: And I had contemplated—

THE COURT: That is all right, but yet—that is all right. How many more Fridays do we have to go along with this, that's what I want to know. I think a lot of it can be shortened by stipulation and agreement.

MR. LEAVITT: May we, if the Court would because of the hour in mind, excuse the witness now, I will recall her again. Perhaps we can—

THE COURT: All right. Do you have any questions you want to ask this witness, Mr. Williams?

MR. LEAVITT: I know that I am not through with her, your Honor, assuming that we can stipulate.

MR. WILLIAMS: Counsel, how much longer? I hate to bring her back to Chicago.

* * * *

[139] Q You indicated drug paraphernalia.

A Manufactured for that purpose and marketed for that purpose.

Q How does one know that?

A There is a whole industry that manufactures. You can get catalogs of that industry. You can get—there are suppliers of that.

MR. LEAVITT: For the purposes of the record, your Honor, at this point there has been offered a written stipulation by and between the parties that Exhibit 1 through 80, except to the extent that they will subsequently be specifically identified by me, were items that were sold by Flipside Records at the time of the enactment of the ordinance and which they have stopped selling generally except for some pipes which I will again specifically identify, subsequent to the enactment of the ordinance. So when I refer to them, your Honor, with the evidence I will submit a new list to the Court which identifies each item specifically as to whether or not it is a Flipside item or some item that was purchased elsewhere.

THE COURT: All right.

[140] BY MR. LEAVITT:

Q Now let me show you again—

THE COURT: Is it stipulated by the parties that these exhibits may be admitted by the Court?

MR. LEAVITT: Yes, your Honor.

(Said exhibits, so offered, were received in evidence as

THE COURT: All right, proceed.

MR. LEAVITT: I am sorry.

MR. WILLIAMS: Yes, subject to written memorandum directed to identify certain items.

MR. LEAVITT: Yes, subject to my identifying specific—

MR. WILLIAMS: We are generally stipulating at this point.

BY MR. LEAVITT:

Q Let me show you a pipe which was sold at Flipside Records as Exhibit No. 45. Will you describe that pipe, please?

A It is a clay pipe and it has a plastic stem. It is made in Turkey. It has a very small hole. It is not like the pipes that my husband has.

Q So you consider, for example, that the pipe 45 was—Exhibit 45—was a pipe made or intended for use with [141] something besides tobacco?

A I would presume so because I have never seen a man use that kind with regular tobacco but I am not sure if that pipe is manufactured and displayed for the purposes that that ordinance says.

Q What if that pipe were displayed with no signs indicating what it is used for? Would it then be covered under the ordinance, would it be marketed?

A If that pipe were to be used with an illegal substance and if it were marketed and made for that reason, yes, it would be included in that ordinance.

If that pipe appeared as an item I would think in a catalogue of drug paraphernalia then I think that that would be a way to ascertain whether or not it was within that ordinance, sir.

Q Are scales drug paraphernalia?

A Pardon?

Q Are scales drug paraphernalia? Flipside sold an assortment of scales. They sold them near literature, pipes and papers. Are scales sold by Flipside, in your opinion, drug paraphernalia?

A In the instance of all of that material, I would say that they were encouraging the use of drugs and in that instance those scales are probably the kind of scales that would be used for illegal drug usage. That is what [142] their purpose of marketing is and that is what their purpose and general use was. Flipside is not a drugstore. It is not a diabetic store. It has a whole section devoted to drug paraphernalia and more than one section.

Q If I asked you to describe what it is and we have talked about pipes—are pipes drug paraphernalia?

A Some pipes are.

Q What type of pipes are drug paraphernalia?

A As I told you, there are certain kinds. That kind I have never seen used for ordinary tobacco. It may very well be, but I doubt it very much. I think that a good usage would be, is it included in a catalogue of drug paraphernalia.

But, as I said, I am not an expert. I rely on those people who know what drug paraphernalia is, per se. I know generally what I think drug paraphernalia is. In the instance of Flipside,

you asked me if I had gone in. Yes. That store has a very definite big display in several areas of drug paraphernalia.

Q I would like you to look at what I would ask be noted as Exhibit 81 and ask if you would describe that?

A It is a pipe.

Q How would you compare the size of the apperture at the top with the pipe, Exhibit No. 45 which you saw before?

A The same size.

Q Would you say then that Exhibit No. 81 was designed, [143] intended and marketed for use with marijuana and other illegal drugs?

A I don't know.

Q Well, you said it was the size that was crucial, about 45, isn't that correct?

A No, I said the inside was different than pipes that I have seen before. When you clean out my husband's pipe, it has a very definite way of being able to be cleaned out and that pipe does not appear to me—the hole, the little hole down there doesn't appear to me to be the kind that my husband's pipes have. That is what I was talking about. I wasn't talking about the top one. I was talking about the little hole.

THE COURT: This is getting to be argument now. This is just an argument between the lawyer and a witness.

MR. LEAVITT: I'm sorry, your Honor.

BY MR. LEAVITT:

Q Are you familiar with what are commonly called postal scales?

A We have postal scales of various kinds in the village hall.

* * * *

[151] THE COURT: Any cross examination?

MR. WILLIAMS: No, your Honor.

THE COURT: Thank you.

THE WITNESS: Thank you, sir.

(Witness excused.)

THE COURT: Did you say you had one more witness you wanted to get through with tonight?

MR. LEAVITT: It is the Chief of Police, your Honor. I could get to him the next time. There is no urgency from my viewpoint. It is for the convenience of Court and counsel.

THE COURT: Now, next Friday I'm going to try to arrange it so that you have more time and we can begin earlier.

MR. LEAVITT: Your Honor, I was going to ask your Minute Clerk, would it be possible if I had no time next Friday that we skip next week? I had a previous matter set.

THE COURT: Well, discuss that with Mr. Anderson.

Now let me take up another matter with you. I entered an order in this case at the time I heard the motion for preliminary injunction, requiring the parties to propose findings of fact and conclusions of law. Now in view of the fact that we are doing the case now on the merits and in view of the provisions of Rule 52(a) which requires the Court to find facts specially and state separately its conclusions of law, the parties are going to be asked to submit, at the conclusion of this hearing, proposed findings [152] of fact and conclusions of law. So, be prepared to submit those to me because I want to look at them and see what facts you think should be found from the evidence.

MR. LEAVITT: Yes, sir.

THE COURT: All right.

MR. WILLIAMS: Yes, your Honor.

THE COURT: We can now adjourn and reconvene either next Friday or the Friday after next. Talk to Mr. Anderson about that detail.

All right, thank you.

(Thereupon at the hour of 5:10 p.m., and adjournment was taken.)

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 78 C 2114 Date February 15, 1980

Title of Cause

The Flipside, Hoffman Estates, Inc., an Illinois Corporation v. Village of Hoffman Estates, a Municipal Corporation

Brief Statement of Motion

Order entering judgment for defendants and against plaintiff in accordance with Memorandum filed this day.

Reserve space below for notations by minute clerk

Cause having been submitted for decision by the court without a jury, and in accordance with the Memorandum filed this day, said Memorandum complying with the requirements of Rule 52(a), Federal Rules of Civil Procedure, the court having found in favor of defendants and against plaintiff, orders the clerk, in accordance with Rule 58 to enter judgment in favor of defendants and against plaintiff, costs to follow the judgment in accordance with the statute.

Docketed February 20, 1980

/s/ Leighton, J.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

PETITION FOR REHEARING OR AMENDMENT OF JUDGMENT
(Filed February 25, 1980)

NOW COMES the Plaintiff, THE FLIP SIDE, HOFFMAN ESTATES, INC., by and through its attorneys, STROUP, GOLDSTEIN, JACOBS, JENKINS and PRITZKER, by Michael L. Pritzker, and moves this Honorable Court, pursuant to Rule 59(a)(2) of the Federal Rules of Civil Procedure, to reopen the above-entitled cause, allow additional briefing in response to the Court's opinion, and to amend its judgment entered herein. In support whereof, your Petitioner, represents and alleges:

1. That hearings were held before this Honorable Court on March 23, 1979 concerning your Petitioner's claim for declaratory and injunctive relief pursuant to 42 U.S.C., Section 1983 and 28 U.S.C., 2201 and 2202 at which testimony from numerous witnesses was heard.

2. That in addition to the evidence adduced at said hearings, the parties entered into various stipulations concerning matters not in dispute which were also submitted to this Honorable Court and made a part of the trial record.

3. That, on May 15, 1979, your Petitioner filed, with the United States District Court of the Northern District of Illinois, Plaintiff's Exhibits 1-85, which had been obtained from numerous local merchants including Flip Side Records, Adam's Apple, S. S. Kresge, Osco and Ace Hardware. (A "List of Exhibits and Sources" is appended hereto as Exhibit "A".)

4. That this Honorable Court entered a judgment in the above-entitled cause in favor of the Defendants, and against Plaintiff, and issued a Memorandum Opinion therewith on February 15, 1980.

5. That your Petitioner believes that, in reaching its judgment, this Honorable Court has inadvertently relied upon certain assumptions regarding the use of drugs which are at substantial variance with the testimony, stipulations and exhibits that form the trial record in this cause.

6. That your Petitioner submits further that the influence of these assumptions has resulted in this Honorable Court overlooking or misapprehending certain important matters, and, in support of this general assertion, Petitioner submits in particular:

A. That the Court has concluded that the language of the Ordinance which describes merchandise proscribed as: "items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" are ordinary words capable of ordinary understanding and adequately convey the scope of the Ordinance. Your Petitioner submits that no clear standard could be agreed upon by the Defendants and that the evidence clearly established that each attempt at application exposed the ambiguity inherent in that phrase.

B. That, by concluding that the term "paraphernalia" is a term readily comprehended by persons acquainted with the drug culture, the Court assumes that some actual relationship has been established between a merchant who will be required by law to conform his conduct to the Ordinance, and drugs. This assumption is at odds with the evidence which established that much of the merchandise which is vaguely described in the ordinance is commonly sold in traditional pipe and tobacco stores as well as many other types of ordinary retail outlets.

C. That the court has misapprehended the significance of your Petitioner's arguments in that where individual items cannot be identified as "paraphernalia" in and of themselves, it is impossible to determine that some undefined quantity, combination or grouping of these items in proximity will create the essential "item-drug" nexus which was previously lacking. It is uncontroverted in the record, for example, that the items offered for sale by Plaintiff that arguably fall under the ambit of the ordinance were displayed together to prevent their shoplifting. Included in said display and therefore converted to "drug paraphernalia" under the proximity "dominoe theory of paraphernalia" were such items as meerschaum and corn cob pipes.

D. That while concluding that the guidelines, which are part of the Ordinance, add specificity to the generic rubric "paraphernalia", the Court did not suggest a standard to cure the vagueness inherent in a "proximity" or "manner of display" standard, nor the relationship that some literature may have to merchandise displayed.

E. That by relying upon the proximity standard the Court did not take cognizance the import of the testimony of Village attorney Williams who testified on numerous occasions that the description "designed or marketed for use with illegal cannabis or drugs" was intended to be applied to items individually and therefore on a "per se" basis. The language of the ordinance in conjunction with the guidelines reinforces that theory.

F. That, in reaching its judgment that the ordinance is not unconstitutionally vague, the Court reasoned that it is reasonable to defer to an unidentified "expert in the field", while the testimony and stipulations establish that no representative of the

Village, including the attorney, who drafted the ordinance, and the Chief of Police, who is primarily responsible for its enforcement, could suggest a procedure or standard for making the critical determination in a uniform manner, and therefore could not reasonably guarantee that a uniform application was possible.

G. That the Honorable Court apparently inadvertantly did not notice that many of the exhibits 1-85 entered into evidence by Plaintiff and described by the Court as "paraphernalia" were in fact purchased from other merchants in Hoffman Estates who have not been nor will be required to comply with the restrictions of the ordinance, to-wit: S.S. Kresge, Osco and Ace Hardware. Thus, the mode of enforcement utilized by the Defendants during the pendency of this cause has restricted the sale of items by Petitioners and not those very same items when sold by other merchants.

H. That the Court misconstrued and misinterpreted the significance of the removal of certain items of merchandise from the shelves of its store in Hoffman Estates by deeming said removal as an admission of Petitioner's comprehension of the scope of the ordinance. Said removal was conducted solely for the purpose of avoiding arrest, involved the removal of any item that might foreseeably be considered drug "paraphernalia" under the sweeping and overinclusive language of the ordinance, and was a legal necessity since an arrest by local police would raise difficulties under the abstention doctrine that might preclude the choice of a federal forum for the adjudication of Petitioner's constitutional claims. Since other merchants were not prohibited from selling these very same objects it is obvious that it was not the objects themselves which Plaintiff feared but the way Defendant interpreted the ordinance against it.

I. That this Honorable Court, although aware of a recent decision by a Three Judge Court which reasoned persuasively that "designed" for drug use language fails to convey that specificity essential to satisfy the due process requirement of prior notice, did not address the reasoning of that ruling or other decisions holding such general language unconstitutional. Plaintiff submits further that the same lack of specificity arises under "marketing" for drug use language.

J. That this Honorable Court has misapprehended the First Amendment claims and arguments of Petitioner thereby not dealing with the direct and indirect censorial impact that the Ordinance will have upon protected expression and the marketing of literature and books. The record reflects, for example that although Plaintiff also carried much non-drug literature such as Rolling Stone and National Lampoon, the presence of some drug message literature was considered significant.

K. That this Honorable Court did not touch upon the "bootstrap" effect of the ordinance which will result because the "marketing intent" will be inferred from the items, in and of themselves, even though the Village vascillates between the significance or lack of significance of such a rule. The ordinance creates a "per se" restriction, and irrebuttable presumptions, that cannot be justified as necessarily valid in fact, flow therefrom.

L. That by focusing the import of the ordinance on "marketing"—whatever that is—the Defendant must abandon the position that the ordinance seeks to regulate merchandise. Since the ordinance does not

regulate all pipes or cigarette papers, for example, this ordinance varies from the dairy example proffered by the Village because in that instance all milk, regardless of marketing technique is regulated.

WHEREFORE, your Petitioner respectfully requests that this Honorable Court reopen the above-entitled cause, allow additional briefing in response to the Court's opinion, and amend its judgment entered in this matter.

Respectfully submitted,
/s/ Michael L. Pritzker
Michael L. Pritzker
STROUP, GOLDSTEIN, JACOBS, JENKINS & PRITZKER
Attorneys for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

EXHIBIT A

Legend:

i	Merchandise displayed and sold by Flip Side, Hoffman Estates, Inc., Plaintiff, prior to May 1, 1978, the effective date of the subject ordinance. (Stipulation of Larry Rosenbaum) and distributed by Adam's Apple Distributors, Inc.
ii	S. S. Kresge and Co., Hoffman Estates, Illinois.
iii	Osco's, Hoffman Estates, Illinois.
iv	Ace Hardware, Hoffman Estates, Illinois
v	Source of item missing.
vi	Cellini's Fine Pipes, 308 West Randolph St., Chicago, Illinois.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

* * (Caption—No. 78 C 2114) * *

PETITION TO RECONSIDER AND AMEND JUDGMENT, OR, IN THE ALTERNATIVE, FOR INJUNCTION PENDING APPEAL. (Filed March 21, 1980)

NOW COMES the Plaintiff, THE FLIPSIDE, HOFFMAN ESTATES, INC., by and through its attorneys, STROUP, GOLDSTEIN, JENKINS & PRITZKER, by Michael L. Pritzker, and moves this Honorable Court, pursuant to the general allowances of Rule 59(a)(2) of the Federal Rules of Civil Procedure, to reconsider its judgment in the above-entitled cause in view of the judgment of the United States Court of Appeals of the Eighth Circuit in the case of *Robin Geiger v. City of Eagen,* et al., No. 79-1831 (March 19, 1980) which held an Ordinance, *similar* to the subject Ordinance, entitled Village of Hoffman Estates, Ordinance No. 969-1978, facially vague and overbroad, and therefore unconstitutional. In the alternative, Petitioners seek an injunction pending appeal, pursuant to Rule 8 of the Federal Rules of Appellate Procedure and Rule 62 of the Federal Rules of Civil Procedure, of the subject Ordinance.

In support of this motion, your Petitioner respectfully submits the following:

1. That your Petitioner is the Plaintiff in the above-entitled cause of action.

2. That this Honorable Court entered a judgment in this matter in favor of Defendant, and against Plaintiffs, and issued a Memorandum Opinion therewith on February 15, 1980.

3. That this Honorable Court denied Plaintiff's "Petition for Rehearing or Amendment of Judgment" on March 14, 1980.

4. That at the hearing concerning said "Petition for Rehearing or Amendment of Judgment," this Honorable Court stated that it was awaiting the decision of the United States Court of Appeals for the Eighth Circuit in the case of *Geiger* v. *Eagan, et al.*, but, in fairness to the parties and to avoid a delay in judgment, would rule without the benefit of the *Geiger* decision, then under submission before the Eighth Circuit Court of Appeals.

5. That subsequent to the aforementioned hearing, on March 19, 1980, the Eighth Circuit Court of Appeals issued its judgment in *Geiger* v. *Eagen, et al., supra* reversing the decision of District Court Judge Henry Alsop and granted an injunction and ruling the contested Eagan Ordinance facially unconstitutional. (A copy of the *Geiger* decision is attached hereto and made a part hereof.)

6. That Plaintiff has suffered and continues to suffer both economic and constitutional irreparable injury as the direct result of the enforcement of the challenged Ordinance No. 969-1978.

7. That Judge Alsop considered it appropriate to issue an injunction pending appeal in the *Geiger* case after his denial of the preliminary injunction in that cause.

8. That the standard for injunctive relief pending appeal is set out in Judge Alsop's second memorandum decision, attached hereto and made a part hereof, and that similar injunctive relief is appropriate in the instant matter pending appeal to the Circuit Court of Appeals of the Seventh Circuit, if Petitioner's Petition to Reconsider and Amendment of Judgment is denied.

WHEREFORE, Petitioner respectfully requests this Honorable Court to reconsider its judgment in the above-entitled cause, amend the judgment therein, or, in the alternative issue an injunction pending appeal of enforcement of the subject Ordinance No. 789-1978 of the Village of Hoffman Estates, Illinois, by Defendants and Defendants' officers, agents, servants, employees and all those in active concert with Defendants who receive notice of such order.

Respectfully submitted,

Michael L. Pritzker
STROUP, GOLDSTEIN, JENKINS & PRITZKER
Attorneys for Plaintiff
Suite 2100
134 North LaSalle Street
Chicago, Illinois 60602
(312) 372-2225

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
Plaintiff,

vs. No. 78 C 2114

VILLAGE OF HOFFMAN ESTATES,
Defendant.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before The Honorable GEORGE N. LEIGHTON, one of the Judges of said Court, in his courtroom in the United States Courthouse at Chicago, Illinois on Friday March 14, 1980 at 9:00 a.m.

PRESENT:

MR. MICHAEL L. PRITZKER
(Stroup, Goldstein, Jacobs, Jenkins, Pritzker & Ware)
134 North LaSalle Street, Room 2100
Chicago, Illinois 60602

for the plaintiff;

MR. RICHARD N. WILLIAMS
Attorney, Village of Hoffman Estates
Hoffman Estates, Illinois 60176

for the defendant.

[2] THE CLERK: 78 C 2114, The Flipside, Hoffman Estates, Inc. vs. Village of Hoffman Estates.

MR. PRITZKER: Good morning, your Honor.

THE COURT: Good morning.

MR. PRITZKER: My name is Michael Pritzker for the plaintiff.

MR. WILLIAMS: Richard Williams for the defendant Village.

THE COURT: Mr. Williams, I wanted to hear from you with regard to the position of the defendant on this motion which is a petition for a rehearing and amendment of judgment. Did you want to answer the memorandum or did you want to be heard?

MR. WILLIAMS: I would like to be heard on one point that I would like to advise the Court for the record and that would be G that he has raised in his motion—

THE COURT: Yes, I find it.

MR. WILLIAMS: —regarding Exhibits 1 to 85 where in the Court's opinion he had stated they were all from the Flipside. I think I must agree with the plaintiff that 72 of these items were from The Flipside and the record and stipulations show that others were from some other shops and stores or other sources.

THE COURT: Well, let me tell you what I think. I [3] don't think that is important. I agree I will have to change the language of the memorandum. I misunderstood it because you know how this matter was heard. I started hearing evidence and then you gentlemen agreed on a stipulation. You submitted to me these exhibits and I had them brought from the Clerk's office. I called Mr. Pritzker's office and he wasn't in the office. I called you. And then I had to do the best I could to understand it. I thought that all of them were taken from the shelves of Flipside. If you tell me 72 were and not 85, I don't think that is important.

MR. WILLIAMS: I don't either, your Honor. I think other than that technical matter, the other matters raised here are those that were raised initially. It raised no new matter to the Court and I was not preparing to file an answer to this.

THE COURT: If that is the extent of this, I want to tell Mr. Pritzker I don't think there is any basis for me to change this ruling. Mr. Pritzker, I worked a long time on this matter. I don't mind telling you there are some cases I don't assign anyone to work on. I will have you know that every word of that somewhat extensive memorandum was written by me after examining every word of the record and every transcript that was available and a study of every single case and I came to the conclusion [4] that this case was different from all the other cases that I could find. If you think I am mistaken I will give you an opportunity to show me. I find no case in the United States where this matter has been handled in the same way. This ordinance is different from any enactment that has ever come to my attention anywhere in the United States.

MR. PRITZKER: Your Honor, the only case that the Court has indicated with regards to definiteness with regards to the word "paraphernalia" as having a well-known and specific meaning was the Johnson case which I think is clearly distinguished.

THE COURT: I know that.

MR. PRITZKER: Quite contrary, your Honor, I think that every other case considering the word "designed" or "marketed", vis-a-vis the word "paraphernalia" have held it to be unconstitutional. Now I would admit, your Honor, that no other ordinance seeks to regulate.

THE COURT: That's right.

MR. PRITZKER: But that doesn't add definiteness to the words.

THE COURT: Mr. Pritzker, I think this matter should be left to the Court of Appeals and if necessary, the Supreme Court of the United States. I remember when you first came before me I told you that I saw no vagueness in this ordinance and I studied it carefully and looked [5] at the dictionary, which is always a good book to read, and I came to the conclusion there is nothing vague about this ordinance and particularly when you bear in mind it is not a criminal enactment, it is a regulatory ordinance.

One thing that I didn't do that I wanted to do and since Mr. Williams is here, I will ask him, because I had to proceed on the assumption that I made from the record. You argue the point, Mr. Williams, that the Village of Hoffman Estates has regulatory ordinances involving some 80 different businesses within the Village of Hoffman Estates. Is that right?

MR. WILLIAMS: That is correct.

THE COURT: So therefore, as I take it, the Village of Hoffman Estates issues regulatory licenses to people who sell milk, butter, cheese and a large number of things and this one here is no different than the others.

MR. WILLIAMS: That is correct.

THE COURT: I would like to have seen the ordinance and I was tempted in the midst of my work to call you and I hesitated to do so, to ask you if you would let me see some of these ordinances the Village has adopted that regulate the sale, say, of milk, to see which way—as I understand it, this is just another ordinance regulating the sale of paraphernalia that can be used with drugs, [6] it is that simple.

MR. PRITZKER: If I may respond, your Honor—

THE COURT: Sure.

MR. PRITZKER: You have indicated it is probably not fruitful. Unlike those ordinances, I would bet, for example, that Hoffman Estates probably regulates all milk. However, this Court has found that the corncob pipe sold by plaintiff is paraphernalia and the corncob pipes sold virtually next door at

Osco, is not. Obviously then the Village does not intend to regulate all corncob pipes and so there must be some criterion or standard by which a merchant knows whether his corncob pipes are such to fall within the ambit of the ordinance.

THE COURT: Well, Mr. Pritzker, we don't live in a perfect world and I just want to tell you I spent hours and hours and hours on this. I even thought of waiting for the Eighth Circuit to decide the case in which you are involved. By the way, have they decided that case?

MR. PRITZKER: No, your Honor.

THE COURT: They haven't?

MR. PRITZKER: It was set for expedited appeal. The check is in the mail.

THE COURT: And you know, that one has one of the best Judges in the country I know of and that is Judge Henley and I was waiting to see what Judge Henley said [7] about that ordinance in Eager, Minnesota.

MR. PRITZKER: Judge Henley was disturbed because several of his pipes were paraphernalia under the ordinance.

MR. WILLIAMS: Your Honor, for the record, before we leave, I want to point out the last question asked by Mr. Pritzker after the corncob pipe we discussed, it was a marketing aspect and certainly the way they market it is different than the way Osco markets it.

THE COURT: In view of what you have said, Mr. Williams, I will look at the memorandum. It has been sent to West Publishing Company. I will correct it. I will see this motion will be granted only to the extent of amending the memorandum of the Court to make it accurate as to the number of the items that were taken from the shelves of the plaintiff by the agents as described in the memorandum. Only to that extent is the motion granted, otherwise it is denied.

MR. WILLIAMS: Thank you, your Honor.

MR. PRITZKER: Thank you.

(Which were all the proceedings had in said cause on said date.)

Filed April 17, 1980
H. Stuart Cunningham, Clerk
United States District Court

[1] IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
Plaintiff,

vs.

VILLAGE OF HOFFMAN ESTATES,
Defendant.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HON. GEORGE N. LEIGHTON, one of the Judges of said Court in his courtroom in the United States Courthouse at Chicago, Illinois on Friday, Feb. 29, 1980 at 9:30 a.m.

PRESENT:

MR. MICHAEL L. PRITZKER
(Stroup, Goldstein, Jacobs, Jenkins, Pritzker & Ware)
134 North La Salle, Room 2100
Chicago, Illinois 60602

on behalf of the plaintiff.

[2] THE CLERK: 78 C 2114, *The Flipside, Hoffman Estates,* vs. *Village of Hoffman Estates.*

MR. PRITZKER: Good morning, your Honor. For the record, my name is Michael Pritzker on behalf of the plaintiff.

THE COURT: Yes.

MR. PRITZKER: Your Honor, we filed a petition.

THE COURT: Yes, Mr. Pritzker, I read what you have filed. I was wondering what was the position of the defendant on this matter. Do you know?

MR. PRITZKER: Your Honor, I talked to Mr. Williams and advised him that the Court in its ordinary course of motion call would hear the case this morning. He advised me that he was detained in another matter and requested that, if possible, the Court either consider it this afternoon or put it over for another day.

THE COURT: I won't be able to consider it. I will put it over to some other time. I just have to hear from Mr. Williams whether the request is going to be made for an opportunity to file a response or answer or if he wants it heard orally. I didn't know.

MR. PRITZKER: Frankly, your Honor, I don't know either. He was to have called your office to determine what your Honor required of him.

THE COURT: No, no, the motion is being filed.

MR. PRITZKER: Yes, sir.

[3] THE COURT: I think it's necessary sometimes to see if I can hear from counsel so I can tell whether I should set further briefing or look at it and listen to you and see what it is.

This sounds to me like the kind of documents I used to read when I was in the Illinois Appellate Court. Isn't that what this amounts to, a petition for rehearing?

MR. PRITZKER: Yes, your Honor.

THE COURT: And you are calling my attention to the various phases of the case. You say I either misunderstood or misconstrued it or something, isn't that what it amounts to?

MR. PRITZKER: Not quite, your Honor. I think a part of it was through no fault of the Court or counsel. As you are

aware, in addition to the evidence being tampered with, a list of the sources of the evidence was, obviously, misplaced and the Court construed Exhibit 1 through 85 upon which it premised some of the reasoning of the Court and went under an assumption that was inaccurate, and it was certainly through no fault of counsel that the Court was misled that items 1 through 85 were all sold at plaintiff's store.

THE COURT: I see.

MR. PRITZKER: And the logic that flows from that distinction, we think that makes a significant difference.

THE COURT: Well, I will hear you. After all, you know how this case was handled. I started to hear the evidence, and then you gentlemen agreed to submit the rest of it on an agreed statement. Isn't that what it amounted to?

[4] MR. PRITZKER: Yes.

THE COURT: And then you took all the exhibits and put them in two big boxes, and you left them in the Clerk's office.

MR. PRITZKER: Under a protective order, sir.

THE COURT: Well, you know you might be interested in knowing Mr. Pritzker, that I understand from Judge Parsons that the FBI has been called into the matter to look and see who it was that pilfered into those two boxes and as soon as I found out, I called your office and had an inventory made.

There's no question about it. Somebody has taken some of those items out of there.

MR. PRITZKER: My only concern about those items, your Honor, was as a result of their absence at the point the Court asked for an examination of the evidence, there were things missing, including the list of evidence, and as a result, I think that inadvertently, I missed some things.

THE COURT: When does Mr. Williams want this continued to?

MR. PRITZKER: I would imagine he would be available next Friday, your Honor.

THE COURT: Continue this to the motion call next Friday and ask Mr. Williams so we will know. Then if we have to have a further hearing date, I will set it.

MR. PRITZKER: Yes, sir.

THE COURT: All right.

MR. PRITZKER: Thank you.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation, *Plaintiff,* *vs.* VILLAGE OF HOFFMAN ESTATES, Illinois, a Municipal Corporation, et al., *Defendants.*	No. 78 C 2114 — Before the Honorable **George N. Leighton,** United States District Judge

JUDGMENT

Judgment Entry in accordance with Rule 58(1) having been entered in favor of defendant, each of them and against the Plaintiff on February 11, 1980, this Court upon considering a Petition for Rehearing or Amendment of Judgment filed on February 25, 1980, and denying said Petition on March 14, 1980, except for a minor correction orders as follows:

It is hereby ordered that Judgment be ordered in favor of defendant, each of them and against the Plaintiff.

Dated at Chicago, Illinois, this 4th day of April, 1980.

Enter: _____

Judge George N. Leighton,
United States District Judge

UNITED STATES DISTRICT COURT,

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 78 C 2114 Date April 4, 1980

Title of Cause

The Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates

Brief Statement of Motion

Order of the court correcting the last paragraph of part II, A on page 15 of this court's Memorandum so that the phrase "a total of 85" will read "a total of 72."

Plaintiff's Petition for Rehearing or Amendment of Judgment filed February 25, 1980 is granted only to the extent of correcting part II, A on page 15 of the court's Memorandum of February 11, 1980 so that the phrase "a total of 85" will read "a total of 72." In all other respects, plaintiff's Petition for Rehearing or Amendment of Judgment is denied.

Docketed April 7, 1980

/s/ Leighton, J.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

* * (Caption—No. 78 C 2114) * *

NOTICE OF APPEAL
(Filed April 7, 1980)

NOTICE is hereby given that THE FLIP SIDE, HOFFMAN ESTATES, INC., Plaintiff in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this action on April 4, 1980.

Michael L. Pritzker
By: /s/ R. Brent Daniel
STROUP, GOLDSTEIN, JENKINS & PRITZKER
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NOTATION OF ITEMS TO BE FOUND IN THE JURISDICTIONAL STATEMENT

The Appendix of the Jurisdictional Statement contains the following items:

Opinion of the Seventh Circuit Court of Appeals	1a
Opinion of the District Court	28a
Denial of Petition for Rehearing by the Seventh Circuit Court of Appeals	46a
Notice of Appeal	47a
Ordinance 969-1978	48a